PRELIMINARY REPORT TO THE DELAWARE GENERAL ASSEMBLY'S CRIMINAL JUSTICE IMPROVEMENT COMMITTEE

Volume 2

March 9, 2017

DELAWARE GENERAL ASSEMBLY'S CRIMINAL JUSTICE IMPROVEMENT COMMITTEE CODE IMPROVEMENT PROJECT

Working Group

Judge William C. Carpenter, Jr.

Robert Goff, Esq.

Lisa Minutola, Esq.

Chief Justice Leo E. Strine, Jr.

Judge Ferris W. Wharton

Staff

Paul H. Robinson, Consultant

Ilya Rudyak, Senior Attorney

Matthew G. Kussmaul, Consulting Attorney

Summary of Contents

Volume 1

PREFACE

HISTORY OF CRIMINAL JUSTICE IMPROVEMENT COMMITTEE'S CODE IMPROVEMENT PROJECT

WHY AN IMPROVED CRIMINAL CODE?
EXECUTIVE SUMMARY
INTRODUCTION
1. ***USE CLEAR, ACCESSIBLE LANGUAGE AND ORGANIZATION***
2. ***PROVIDE A COMPREHENSIVE STATEMENT OF RULES***
3. ***CONSOLIDATE OFFENSES***
4. ***GRADE OFFENSES RATIONALLY AND PROPORTIONALLY***
5. ***RETAIN ALL — BUT ONLY — RATIONAL, DEFENSIBLE POLICY DECISIONS EMBODIED IN CURRENT LAW***

PREPARING FOR CHANGE
CONCLUSION

THE PROPOSED CODE

TABLE OF CONTENTS
PART I: THE GENERAL PART
PART II: DEFINITION OF SPECIFIC OFFENSES (SPECIAL PART)

SUMMARY GRADING TABLE

CONVERSION TABLE BY CURRENT PROVISION

CONVERSION TABLE BY PROPOSED DRAFT

Volume 2

THE PROPOSED COMMENTARY

TABLE OF CONTENTS
PART I: THE GENERAL PART
PART II: DEFINITION OF SPECIFIC OFFENSES (SPECIAL PART)

VOLUME 2 CONTENTS

The Proposed Commentary

Table of Contents.....289

Part I: The General Part
Preliminary Provisions
Chapter 100. Preliminary Provisions.....296
Requirements of Offense Liability
Chapter 200. Basic Requirements of Offense Liability.....305
General Defenses
Chapter 300. Justification Defenses.....323
Chapter 400. Excuse Defenses.....337
Chapter 500. Nonexculpatory Defenses.....346
Liability of Organizations
Chapter 600. Liability of Organizations.....353
Inchoate Offenses
Chapter 700. Inchoate Offenses.....355
Offense Grades and Their Implications
Chapter 800. Offense Grades and Their Implications.....364

Part II: Definition of Specific Offenses (Special Part)
Offenses Against the Person
Chapter 1100. Homicide Offenses.....375
Chapter 1200. Robbery, Assault, Endangerment, and Threat Offenses.....384
Chapter 1300. Sexual Offenses.....400
Chapter 1400. Kidnapping, Restraint, Coercion and Related Offenses.....412
Property Offenses
Chapter 2100. Theft and Related Offenses.....417
Chapter 2200. Forgery and Fraudulent Practices.....429
Chapter 2300. Arson and Other Property Damage Offenses.....442
Chapter 2400. Burglary and Other Criminal Trespass Offenses.....451
Offenses Against Public Administration
Chapter 3100. Bribery, Improper Influence, and Official Misconduct.....454
Chapter 3200. Perjury and Other Official Falsification Offenses.....459
Chapter 3300. Offenses Involving Obstruction of Governmental Operations; Escape.....463
Offenses Against Public Health, Order, and Decency

Chapter 4100. Offenses Against Public Order and Safety.....472
Chapter 4200. Public Indecency and Obscenity Offenses.....480
Chapter 4300. Invasion of Privacy Offenses.....490
Chapter 4400. Offenses Against the Family.....499
Chapter 4500. Offenses Involving Gambling.....506
Crime Control Offenses
Chapter 5100. Offenses Involving Firearms and Other Deadly Weapons.....512
Chapter 5200. Drug and Related Offenses.....524
Chapter 5300. Offenses Involving Organized Crime and Racketeering.....540

Table of Contents

Part I: The General Part

Preliminary Provisions

Chapter 100. Preliminary Provisions

Section 101. Short Title and Effective Date
Section 102. Principle of Construction; General Purposes
Section 103. All Offenses Defined by Statute; Applicability
Section 104. Civil Remedies Preserved; No Merger with Civil Injury
Section 105. State Criminal Jurisdiction
Section 106. Burdens of Proof; Permissive Inferences
Section 107. Words of Gender or Number
Section 108. Definitions
Section 109. Definitions Index

Requirements of Offense Liability

Chapter 200. Basic Requirements of Offense Liability

Section 201. Basis of Liability
Section 202. Offense Elements Defined
Section 203. Causal Relationship Between Conduct and Result
Section 204. Requirement of a Voluntary Act; Omission Liability; Possession Liability
Section 205. Culpability Requirements
Section 206. Ignorance or Mistake Negating Required Culpability
Section 207. Mental Illness or Disorder Negating Required Culpability
Section 208. Consent
Section 209. Customary License; De Minimis Infractions; Conduct Not Envisaged by General Assembly as Prohibited by the Offense
Section 210. Conviction When the Defendant Satisfies the Requirements of More than One Offense or Grade
Section 211. Accountability for the Conduct of Another
Section 212. Voluntary Intoxication
Section 213. Divergence Between Consequences Intended or Risked and Actual Consequences
Section 214. Definitions

General Defenses

Chapter 300. Justification Defenses

Section 301. General Provisions Governing Justification Defenses
Section 302. Choice of Evils
Section 303. Execution of Public Duty
Section 304. Law Enforcement Authority

Section 305. Conduct of Persons with Special Responsibility for Care, Discipline, or Safety of Others
Section 306. Defense of Person
Section 307. Defense of Property
Section 308. Definitions

Chapter 400. Excuse Defenses
Section 401. General Provisions Governing Excuse Defenses
Section 402. Involuntary Act; Involuntary Omission
Section 403. Mental Illness
Section 404. Involuntary Intoxication
Section 405. Duress
Section 406. Ignorance Due to Unavailable Law
Section 407. Reliance Upon Official Misstatement of Law
Section 408. Reasonable Mistake of Law Unavoidable by Due Diligence
Section 409. Mistake as to a Justification
Section 410. Definitions

Chapter 500. Nonexculpatory Defenses
Section 501. General Provisions Governing Nonexculpatory Defenses
Section 502. Prosecution Barred if Not Commenced Within Time Limitation Period
Section 503. Entrapment
Section 504. Prior Prosecution for Same Offense as a Bar to Present Prosecution
Section 505. Prior Prosecution for Different Offense as a Bar to Present Prosecution
Section 506. Prior Prosecution by Another Jurisdiction as a Bar to Present Prosecution
Section 507. Prosecution Not Barred Where Former Prosecution Was Before a Court Lacking Jurisdiction or Was Fraudulently Procured by Defendant or Resulted in Conviction Held Invalid
Section 508. Testimonial Immunity
Section 509. Prosecutorial Grant of Immunity
Section 510. Definitions

Liability of Organizations
Chapter 600. Liability of Organizations
Section 601. Criminal Liability of Organizations
Section 602. Criminal Liability of an Individual for Organizational Conduct
Section 603. Definitions

Inchoate Offenses
Chapter 700. Inchoate Offenses

Section 701. Criminal Attempt
Section 702. Criminal Solicitation
Section 703. Criminal Conspiracy
Section 704. Unconvictable Confederate No Defense
Section 705. Defense for Victims and for Conduct Inevitably Incident
Section 706. Defense for Renunciation Preventing Commission of the Offense
Section 707. Grading of Criminal Attempt, Solicitation, and Conspiracy
Section 708. Possession of Instruments of Crime

Offense Grades and Their Implications
Chapter 800. Offense Grades and Their Implications
Section 801. Offense Grades
Section 802. Authorized Terms of Imprisonment
Section 803. Authorized Fines; Restitution
Section 804. General Adjustments to Offense Grade
Section 805. Valuation of Property for the Purposes of Grading
Section 806. Definitions

Part II: Definition of Specific Offenses (Special Part)

Offenses Against the Person
Chapter 1100. Homicide Offenses
Section 1101. Aggravated Murder
Section 1102. Murder
Section 1103. Manslaughter
Section 1104. Negligent Homicide
Section 1105. Causing or Aiding Suicide
Section 1106. Unlawful Abortion
Section 1107. Definitions
Section 1108. Procedures and Standards in Adjudication of Sentence for a Capital Offense

Chapter 1200. Robbery, Assault, Endangerment, and Threat Offenses
Section 1201. Robbery
Section 1202. Assault
Section 1203. Reckless Injuring
Section 1204. Reckless Endangerment
Section 1205. Operating a Vehicle While Under the Influence of Drugs or Alcohol
Section 1206. Genital Mutilation of a Female Minor
Section 1207. Terroristic Threats and Hoaxes
Section 1208. Unlawfully Administering Drugs
Section 1209. Reckless Infliction of Severe Mental or Emotional Harm
Section 1210. Definitions

Chapter 1300. Sexual Offenses
Section 1301. Rape and Sexual Assault
Section 1302. Prohibited Sexual Contact by Persons in Positions of Trust
Section 1303. Bestiality
Section 1304. Prohibited Conduct by a Person Convicted of a Sexual Offense Against a Child
Section 1305. Sexual Harassment
Section 1306. General Provisions Relating to this Chapter
Section 1307. Definitions

Chapter 1400. Kidnapping, Restraint, Coercion and Related Offenses
Section 1401. Kidnapping and Unlawful Restraint
Section 1402. Human Trafficking
Section 1403. Coercion
Section 1404. Definitions

Property Offenses
Chapter 2100. Theft and Related Offenses
Section 2101. Consolidation of Theft Offenses
Section 2102. Theft by Unlawful Taking or Disposition
Section 2103. Theft by Deception
Section 2104. Theft by Extortion
Section 2105. Theft of Property Lost, Mislaid, or Delivered by Mistake
Section 2106. Theft of Services
Section 2107. Receiving Stolen Property
Section 2108. Unauthorized Distribution of Protected Works
Section 2109. Unauthorized Use of a Vehicle
Section 2110. Definitions

Chapter 2200. Forgery and Fraudulent Practices
Section 2201. Forgery and Counterfeiting
Section 2202. Fraudulent Tampering with Records
Section 2203. Fraudulent Treatment of Public Records
Section 2204. Issuing a Bad Check
Section 2205. Unlawful Use of a Payment Card
Section 2206. Deceptive Business Practices
Section 2207. Defrauding Secured Creditors
Section 2208. Fraud in Insolvency
Section 2209. Identity Theft
Section 2210. Commercial Bribery
Section 2211. Fraudulent Conveyance of Public Lands
Section 2212. Unauthorized Impersonation
Section 2213. Definitions

Chapter 2300. Arson and Other Property Damage Offenses
Section 2301. Arson

Section 2302. Endangering by Fire or Explosion
Section 2303. Unlawful Incendiary Devices
Section 2304. Criminal Damage
Section 2305. Causing or Risking Catastrophe; Ecological Catastrophe
Section 2306. Definitions

Chapter 2400. Burglary and Other Criminal Trespass Offenses
Section 2401. Burglary and Home Invasion
Section 2402. Criminal Trespass
Section 2403. Definitions

Offenses Against Public Administration
Chapter 3100. Bribery, Improper Influence, and Official Misconduct
Section 3101. Bribery
Section 3102. Improper Influence
Section 3103. Official Misconduct
Section 3104. Definitions

Chapter 3200. Perjury and Other Official Falsification Offenses
Section 3201. Perjury
Section 3202. Falsification Under Penalty
Section 3203. Tampering with Public Records
Section 3204. Criminal Impersonation
Section 3205. Definitions

Chapter 3300. Offenses Involving Obstruction of Governmental Operations; Escape
Section 3301. Obstructing Justice
Section 3302. Resisting or Obstructing a Law Enforcement Officer
Section 3303. Obstructing Administration of Law or Other Government Function
Section 3304. Refusing to Aid an Officer
Section 3305. Escape
Section 3306. Prohibited Conduct Related to Official Custody
Section 3307. Intimidating, Improperly Influencing, or Retaliating Against a Witness, Juror, or Victim
Section 3308. Criminal Contempt
Section 3309. Definitions

Offenses Against Public Health, Order, and Decency
Chapter 4100. Offenses Against Public Order and Safety
Section 4101. Riot; Disorderly Conduct; Failure to Disperse
Section 4102. Public Alarms
Section 4103. Stalking; Harassment
Section 4104. Public Intoxication
Section 4105. Loitering
Section 4106. Obstructing Public Ways

Section 4107. Desecration
Section 4108. Definitions

Chapter 4200. Public Indecency and Obscenity Offenses
Section 4201. Public Indecency
Section 4202. Prostitution; Patronizing a Prostitute
Section 4203. Promoting or Permitting Prostitution
Section 4204. Distribution and Possession of Obscene Material and Child Pornography
Section 4205. Unauthorized Combat Event
Section 4206. Abuse of Human Remains or Associated Funerary Objects
Section 4207. Cruelty to Animals
Section 4208. Definitions

Chapter 4300. Invasion of Privacy Offenses
Section 4301. Unlawful Eavesdropping or Surveillance
Section 4302. Voyeurism
Section 4303. Interception of Private Information
Section 3204. Unlawful Use of Information
Section 4305. Unlawful Dissemination of Personal Pornography
Section 4306. Unlawful Access to Information
Section 4307. Definitions

Chapter 4400. Offenses Against the Family
Section 4401. Incest
Section 4402. Bigamy
Section 4403. Child Abandonment
Section 4404. Interference with Custody
Section 4405. Assisting a Runaway
Section 4406. Contributing to the Delinquency of a Minor
Section 4407. Persistent Non-Support
Section 4408. Definitions

Chapter 4500. Offenses Involving Gambling
Section 4501. Unlawful Gambling and Betting Practices
Section 4502. Cheating and Related Offenses
Section 4503. Definitions

Crime Control Offenses
Chapter 5100. Offenses Involving Firearms and Other Deadly Weapons
Section 5101. Possessing a Firearm or Deadly Weapon During Commission of an Offense; Supplying a Firearm for Felonious Possession
Section 5102. Dealing in Unlawful Weapons
Section 5103. Carrying a Concealed Deadly Weapon or Dangerous Instrument
Section 5104. Possessing or Purchasing Deadly Weapons by Persons Prohibited
Section 5105. Providing Weapons to Disqualified Persons

Section 5106. Possessing a Firearm While Under the Influence of Drugs or Alcohol
Section 5107. Offenses Related to Background Checks for Firearm Sales
Section 5108. Grade Adjustment for Offenses Committed in a Safe School and Recreation Zone
Section 5109. Definitions

Chapter 5200. Drug and Related Offenses
Section 5201. Possession of Controlled and Noncontrolled Substances
Section 5202. Manufacture or Delivery Controlled and Noncontrolled Substances
Section 5203. Aggravating Factors Providing Grade Increase for Offenses in Sections 5201–02
Section 5204. Possession, Manufacture, or Delivery of Drug Paraphernalia
Section 5205. Prescription Drug Registrant Offenses
Section 5206. Unlawful Possession of a Prescription Form
Section 5207. Internet Pharmacy Offenses
Section 5208. Immunity in Life-Threatening Emergency
Section 5209. Court Having Jurisdiction
Section 5210. Definitions

Chapter 5300. Offenses Involving Organized Crime and Racketeering
Section 5301. Racketeering
Section 5302. Gang Participation
Section 5303. Money Laundering
Section 5304. Definitions

PART I: THE GENERAL PART

PRELIMINARY PROVISIONS

CHAPTER 100. PRELIMINARY PROVISIONS

Section 101. Short Title and Effective Date
Section 102. Principle of Construction; General Purposes
Section 103. All Offenses Defined by Statute; Applicability
Section 104. Civil Remedies Preserved; No Merger with Civil Injury
Section 105. State Criminal Jurisdiction
Section 106. Burdens of Proof; Permissive Inferences
Section 107. Words of Gender or Number
Section 108. Definitions; General Definitions
Section 109. Definitions Index

General Comments Regarding Chapter 100:

Corresponding Current Provision(s): 11 Del. C. §§ 233, 302, 308

Comment:

The proposed Chapter 100 does not specifically address the following current provisions:

Definition and classification of offenses. 11 Del. C. § 233 is not included because every offense definition throughout the Special Part determines what conduct is forbidden. Because all offenses must be defined by statute under both 11 Del. C. § 202 and proposed Section 103(a), no further provision is necessary. Additionally, the classification of offenses is done comprehensively in Section 801, so no reference to it here is necessary.

Jury instruction for defendant on reasonable doubt. 11 Del. C. § 302 is not included because it addresses purely procedural issues that are best collected with others like it in the part of Title 11 dealing with criminal procedure.

Construction of provisions allowing no defense. 11 Del. C. § 308 is not included because the Proposed Code is drafted to minimize the likelihood that provisions denying a defense would be construed to authorize other defenses.

Comment on Section 101. Short Title and Effective Date

Corresponding Current Provision(s): 11 Del. C. §§ 101, 102, 103

Comment:

Generally. This provision gives a name for the Code and specifies the date on which it becomes legally effective. It also specifies the effect of current law in prosecutions committed after the effective date, but which concern conduct that occurred before the effective date of the Code.

Relation to current Delaware law. Section 101(a) is substantially similar to 11 Del. C. § 101. Section 101(b)–(c) are substantially similar to 11 Del. C. §§ 102–03. But, as this Code does not touch on general criminal procedure, sentencing, parole, or probation, § 102(b)(1) and (c) are not addressed.

Comment on Section 102. Principle of Construction; General Purposes

Corresponding Current Provision(s): 11 Del. C. §§ 201, 203, 211

Comment:

Generally. This provision articulates the general legislative purposes of the Code and sets forth the principles of construction to be used in its interpretation.

Relation to current Delaware law. Section 102(a) combines, and is substantially similar to, 11 Del. C. §§ 201 and 203. Language has been added to Subsection (a) to clarify that when the language of a statute is subject to differing constructions, the courts should first "apply[] general principles of statutory interpretation and available signs of legislative intent . . . ." Courts should resort to the general purposes of the Code set forth in Subsections (a)(1)–(4) for guidance only if the language remains ambiguous after using those rules in an effort to determine the intent behind a specific provision. This order of preference ensures that the general purposes do not "trump" a more specific legislative intent as to a particular provision. The proposed provision expands on the rule of construction in 11 Del. C. § 203, which simply states that "the provisions herein must . . . effect the purposes of the law, as stated in § 201 of this title," but does not specify when, or how, courts should resort to those general purposes.

Sections 102(a)(1)–(4) are substantially similar to the general purposes in 11 Del. C. §§ 201(1)–(4). In Subsection (a)(3), the term "culpability" has been substituted for "mental state" in § 201(3) to maintain consistent terminology throughout the Proposed Code. Current § 201(4) has been reworded in Subsection (a)(4) to maintain the principle of proportional punishment it expresses, but reflect the fact that the Proposed Code distinguishes between more nuanced gradations than simply "serious" and "minor" offenses, mentioned in § 201(4). All offenses in the Proposed Code are set on a continuum of blameworthiness, from violations to Class 1 felonies. The reformulation of § 201(4) more accurately expresses that idea.

Note that Subsections (a)(1)–(4) make no reference to the distributive principles of deterrence, incapacitation and rehabilitation (implied by 11 Del.C § 201(5)). As criminal law literature had pointed out, providing a list of conflicting distributive principles is unhelpful and often counterproductive, since it promotes inconsistent interpretation of the law according to each interpreter's preferred distributive principle. Moreover, while originally the Model Penal Code also listed conflicting distributive principles in § 1.02(2), the American Law Institute's first amendment of the Model Penal Code in 2007 modified that provision. The amended provision determines the primacy of proportional punishment (as a function of: "the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders") over alternative distributive principles. While the Proposed Code has not taken up this debate, nothing in it is inconsistent with the amended Model Penal Code's position.

Section 102(b) provides that this Commentary "should be used as an aid in interpreting" the Code. The provision does not specify how much weight courts are to give the Commentary in interpreting the Code, however, it points out that they should use the Commentary as a guide.

Section 102(c) provides that no headings used throughout the Code "shall exclusively govern, limit, modify, or affect the scope, meaning, or intent of a provision." Nevertheless, it also provides that "headings may be used as an aid in interpreting the provisions of this Code. This provision does not appear in current law, but it is useful to ensure that the language of the Code is not misinterpreted due to its heading. Headings are used often throughout the Code, and their main goal is to help the reader find key provisions quickly, and at times to highlight the typical case to which the provision refers to. The headings therefore should not be read as *exclusively* limiting the provision they refer to. Consider for instance the heading used in Section 4204(b)(5) "Sexting Among Minors". While the meaning of the colloquial word "Sexting" may change, such change will not necessarily limit the applicability of the provision in a case when the elements described in its text exist. Nevertheless, headings do impact Code users' understanding of the meaning of its provisions, and subsequently the notice they provide. Therefore, the Code explicitly recognizes that headings *may* be used as an aid in the interpretation of those provisions.

Sections 102(d)(2)–(3), providing that repealing one provision of the Code does not affect either liability already incurred or pending proceedings under that provision, are substantially similar to 11 Del. C. § 211. Subsection (d)(1) is a standard savings clause that has been added for clarity, though the current code does not explicitly provide one.

Comment on Section 103. All Offenses Defined by Statute; Applicability

Corresponding Current Provision(s): 11 Del. C. §§ 103, 202, 241

Comment:

Generally. This provision prohibits common-law offenses by requiring that offenses be defined in the Code or another statute. At the same time, the provision recognizes and preserves the courts' inherent powers to punish for contempt and to enforce orders and civil judgments. Section 103 also provides that the Code's General Part applies to all offenses in the Code itself, as well as to offenses defined by statutes other than the Code, unless the Code otherwise provides.

Relation to current Delaware law. Sections 103(a) and (c) are substantially the same as 11 Del. C. §§ 202(a) and (b). Section 103(b) performs the same function as 11 Del. C. § 103. Section 103(d) provides that conviction must precede imposition of punishment, which is based upon 11 Del. C. § 241. However, the portions of § 241 requiring personal and subject matter jurisdiction are not included. Although those are crucial requirements, they are determined by other sources of law. *See e.g.*, Del. Const., Art. 4, § 7; 11 Del. C. § 2701(c).

Comment on Section 104. Civil Remedies Preserved; No Merger with Civil Injury

Corresponding Current Provision(s): *E.g.,* 11 Del. C. § 1113(h); 16 Del. C. § 4744(h)

Comment:

Generally. This provision makes clear that the Code does not negatively affect rights or liabilities in civil actions related to conduct made punishable by the Code, nor do civil actions affect or bar criminal liability under the Code for the same prohibited conduct.

Relation to current Delaware law. Section 104 has no corresponding provision in the general part of the current Delaware Code. But, there are provisions scattered throughout the code that apply the same rule to specific offenses. *See, e.g.,* 11 Del. C. § 1113(h) ("No civil proceeding in any court or administrative agency shall be a bar to prosecution for criminal nonsupport . . . ."); 16 Del. C. § 4744(h) ("Nothing in this section shall be construed to limit . . . civil or administrative action permitted by law . . . ."). No provision in current law contradicts the principle in proposed Section 104, and the Delaware Supreme Court has stated that "the State may impose both a criminal and a civil penalty for the same act." *Tarr v. State*, 486 A.2d 672, 675 (Del. 1984). Section 104 codifies this rule and applies it consistently throughout the Proposed Code.

Comment on Section 105. State Criminal Jurisdiction

Corresponding Current Provision(s): 11 Del. C. §§ 204, 940

Comment:

Generally. This provision provides the rules for determining whether a person is subject to prosecution in the State for an offense.

Relation to current Delaware law. Section 105 is substantially similar to 11 Del. C. § 204. Section 105(a)(1) corresponds to § 204(a)(1), but has been simplified. The references to "conduct" and "results" have been consolidated in the defined phrase "partly within this State," which is defined in Section 108(b)(1), to make Subsection (a)(1) easier to read. Due to the number of computer-related offenses that have been added to the current code in the last twenty years, "partly within this state" has been expanded to include storing or receiving electronic communications or data. *See* Commentary to Section 108.

Subsection (a)(3) corresponds to § 204(a)(2), providing jurisdiction over a conspiracy to commit an offense within the State, so long as an overt act in furtherance of the conspiracy occurs in the State. Subsection (a)(2) has been added in light of Subsection (a)(3) to provide jurisdiction over an attempt to commit an offense within the State. Attempt and conspiracy generate similar inchoate liability, and attempt liability requires a "substantial step" towards completion of the offense in the same way that a conspiracy requires an overt act.

Subsection (a)(4) corresponds to § 204(a)(5), but has restructured that provision to make its elements clear. However, the culpability requirement in § 204(a)(5) that the defendant "knows or should know that . . . [his] conduct is likely to affect . . . [a legitimate interest of Delaware]" has been changed to "recklessness." "Knows or should know" is a requirement most similar to negligence, which is too slight to support jurisdiction based solely on affecting the State's interests.

Subsection (a)(5) corresponds to § 204(a)(3), providing for jurisdiction where the defendant's acts within this State constitute inchoate or accomplice liability as to an offense in another jurisdiction, and the conduct is an offense both in this State and in the target jurisdiction.

Subsection (a)(6) directly corresponds to 11 Del. C. § 204(a)(4), providing that an omission to perform a duty imposed by the laws of this State occurs in the State, regardless of the defendant's location at the time of the omission.

Subsection (a)(7) defines what it means when, for jurisdictional purposes, an offense is committed partly within this State. As discussed above, Subsection (a)(7)(A) is based upon 11 Del. C. § 204(a)(1), while Subsection (a)(7)(B) is a necessary addition to jurisdiction based on the need to deal with electronic information and communication. *See, e.g.*, 11 Del. C. §§ 1109(4) (providing jurisdiction over child pornography offense committed outside the State when digital files are stored or received by a computer in the State), 940 (setting specialized venue rules for computer crimes). Subsection (a)(7)(B) has been generalized to cover all of the specific jurisdictional provisions it has been created to supersede.

Section 105(b) corresponds to 11 Del. C. § 204(b), but has been restructured to make the elements of the exception clear, and make explicit that the defendant's recklessness applies not merely to the occurrence of the result within the state, but also to his causation of this result.

Section 105(c) directly corresponds to 11 Del. C. § 204(c), providing a rebuttable presumption that if a homicide victim's body is found in this State, the homicide occurred in this State as well.

Comment on Section 106. Burdens of Proof; Permissive Inferences

Corresponding Current Provision(s): 11 Del. C. §§ 232, 301, 303, 304, 305, 306

Comment:

Generally. This provision sets forth the presumption that a defendant is innocent until proven guilty, establishes two distinct burdens of proof, and provides rules for the consequences of permissive inferences established elsewhere in the Proposed Code.

Relation to current Delaware law. The presumption of innocence in Section 106(a) is followed in Delaware, though it does not appear explicitly in current Delaware statutes.

Sections 106(b) and (c) establish two distinct evidentiary burdens for different stages of a criminal proceeding. Section 106(b) sets forth the ultimate burden of *persuasion*. Section 106(b) consolidates a few different provisions in current law, with Subsection (b)(1) laying out the burden of the State, and Subsection (b)(2) laying out the burden of the defendant. Subsection (b)(1)(A) directly corresponds to 11 Del. C. § 301(b), putting the ultimate burden of persuasion on the State to establish all elements of an offense beyond a reasonable doubt. Under the Proposed Code, exceptions to liability are treated as specific refinements of an offense definition, not affirmative defenses. *See* Section 108 [Definitions] and corresponding commentary. This is a different approach to the use of exceptions than current law, which, in 11 Del. C. § 305 treats exceptions identically to affirmative defenses. Given this different approach, § 305 cannot be carried forward, because the Constitution does not permit the burden of disproving elements of an offense to be shifted onto a defendant. As a result, Subsection (b)(1)(A) places the burden of persuasion upon the State to disprove exceptions, once properly raised by the defendant, beyond a reasonable doubt.

Section 106(b)(1)(B), placing that ultimate burden upon the State to disprove all justification defenses beyond reasonable doubt, is a compromise position between possible readings of §§ 301 and 303. Current §301(b) states that "no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt"; § 303 places the burden of production for non-affirmative defenses upon the defendant; and § 303(c) requires a jury instruction that defendant must be acquitted if the jury finds that the defense raises a reasonable doubt as to the defendant's guilt. These provisions, however, fail to state explicitly which party bears the burden of persuasion in establishing the existence of the defense, and by what standard of proof. Despite some ambiguity, and in light of the current Delaware practice requiring the State to disprove all justification defenses beyond reasonable doubt, the nonpartisan consultative group supervising the drafting process for this Proposed Code, decided that such burden will be maintained and clearly specified in Section(b)(1)(B).

Section 106(b)(1)(C) provides a new default rule that all other facts required for liability need only be proven by the State by a preponderance of the evidence. 11 Del. C. § 232, in defining what are elements of offenses, provides that "[f]acts establishing jurisdiction and venue and establishing that the offense was committed within the [statutory limitations period] must also be proved as elements of the offense." This is the sole provision in current law that might speak to the burden of proof as to jurisdiction, venue, or other facts required for liability. At a minimum, § 232 suggests that issues of jurisdiction, venue, and limitations must be properly alleged by the State in an indictment; but, by equating these items with elements of the offense, § 232 implies that the State bears the burden of also proving those elements to the jury beyond a reasonable doubt. It seems highly unlikely that the General Assembly intended to saddle the State with such a difficult task, one that is not constitutionally required. In the face of these ambiguities, Subsection (b)(1)(C) proposes that the State bear the burden of proving facts required for liability—like jurisdiction and venue—that are not actual elements of an offense *definition*, but by the lower preponderance standard. This ensures that a consistent rule is applied and that proof beyond a reasonable doubt—an extremely exacting burden for facts that are not elements of the offense definition—is not applied unintentionally.

Section 106(b)(2) directly corresponds to 11 Del. C. §§ 304. Note that because Subsection (b)(1)(B) specifically allocates the burden of persuasion for justification defenses to the State, justification defenses are not included in Subsection (b)(2).

Section 106(b)(3) sets out what it means to prove an element of an offense or defense by a preponderance of the evidence. This directly corresponds to 11 Del. C. § 304(c).

Section 106(c) sets forth the burdens of production for the State and the defendant. The burdens of production define the requisite threshold amount of evidence the burdened party must present to have an issue sent to the "trier of fact" (the jury in a jury trial, or the court in a bench trial). Section 106(c)(2), as previously mentioned, maintains the current standards in 11 Del. C. §§ 303 and 304(a)–(b), placing the burden of production on the defendant for defenses and mitigations. Because current law does not explicitly provide who bears the burden of production for exceptions to liability, they have been added to Subsection (c)(2). Subsection (c)(1)(A) corresponds to 11 Del. C. § 301(a) and mirrors (c)(2) by explicitly placing the burden of production on the State for offenses to be considered by the trier of fact. Subsection (c)(1)(B) corresponds to 11 Del. C. § 301(c), which provides that "[i]n any prosecution for any compound crime, . . . the corpus delicti of the underlying felony need not be proved independently of a defendant's extrajudicial statement." But, because the only compound crime carried forward into the Proposed Code that is described in § 301(c) is felony murder, Subsection (c)(1)(B) is written

to only apply to felony murder. In the language proposed by Sections 105(b)–(c), the current provision translates into an assurance that the prosecution can still meet its burden of production, allowing the case of a compound crime to proceed to trial, even if the only evidence of the underlying felony is the defendant's confession. This requirement is structured under Subsection (c) to make clear that this requirement does not alter the State's ultimate burden of persuasion to prove the underlying felony beyond a reasonable doubt.

Section 106(d) explains the significance of permissive inferences established elsewhere in the Proposed Code. Although 11 Del. C. § 306 discusses rebuttable presumptions, it does not explain the evidentiary effect of a rebuttable presumption. 11 Del. C. § 306(e) only provides, importantly, that the establishment of a rebuttable presumption does not relieve the State of its ultimate burden of persuasion. As discussed above, this requirement is maintained in Section 106(b). Subsection (d), and the use of permissive inferences throughout the Proposed Code, are intended to replace the use of "rebuttable presumptions" throughout the current code.[1] Therefore, Subsection (d) does not establish any general presumptions. But note that the trier of fact is permitted to infer a defendant's culpability from the facts of the case under Section 106(d)(2).

Note that the Proposed Code, as is specified in the current code in 11 Del. C. § 306, contains no conclusive presumptions. Section 106 does not expressly state this position because all conclusive presumptions were already abolished by the current code, and the Proposed Code does not contain any. Furthermore, conclusive presumptions of fact against a defendant are *per se* unconstitutional. *Plass v. State*, 457 A.2d 362, 366 (Del. 1983) ("The federal Constitution . . . would prohibit a statute which amounts to a conclusive presumption (i.e. directs the jury to find intent from the basic facts) or shifts the burden of persuasion to the defendant (i.e. violates the constitutional requirement that the State must prove every essential element of the offense beyond a reasonable doubt).").

Note that Section 106 explicitly mentions "mitigations" whenever it discusses defenses to make clear that it may apply to rules that reduce liability as well as to rules that exonerate the defendant entirely. *See, e.g.*,, proposed Section 1103(a)(2) (defining a statutory mitigation to reduce liability from murder to manslaughter). Current law does not specifically provide evidentiary burdens for mitigations.

Defenses, Affirmative Defenses, and General Defenses. The Proposed Code eliminates use of the term "affirmative defense." The distinction between defenses and affirmative defenses is often misunderstood, and for good reason. Current Delaware law does not carefully set

---

[1] The Supreme Court of the United States decided in *Sandstrom v. Montana*, 442 U.S. 510 (1979) that "[a] presumption which, although not conclusive, [has] the effect of shifting the burden of persuasion to the defendant . . . [suffers] from similar infirmities" as a conclusive presumption. *442 U.S. at* 524. A jury instruction explaining the effect of a rebuttable presumption, however, does not violate the Constitution if it "merely describe[s] a *permissive inference*—that is, it allow[s] but d[oes] not require the jury to draw conclusions . . . ." *Id.* at 514 (emphasis added). Under Delaware Supreme Court decisions following *Sandstrom*, it is clear that rebuttable presumptions presented to the jury in their plain terms—i.e., as "presumptions"—impermissibly shift the burden of persuasion on the defendant. *See, e.g., Plass v. State*, 457 A.2d 362, 367–68 (Del. 1983) (referring to 11 Del. C. § 306(c)(1), stated verbatim in a jury instruction, as "glaringly deficient," in part because "it is stated in terms of 'presumed.'"). On the other hand, a jury instruction that explains a rebuttable presumption in terms of an inference the jury is permitted (but not required) to make, and without using language of "presumption," stands constitutional scrutiny under *Sandstrom*. *See, e.g., Craig v. State*, 457 A.2d 755, 761–62 (Del. 1983).

11 Del. C. § 306 was enacted before *Sandstrom*. Delaware courts have admirably shaped the application of § 306 to prevent it from running afoul of the Constitution, but by explaining it at length in terms that avoid its plain meaning. Rather than continue this practice, it is proposed that "rebuttable presumptions" be renamed what they must be under *Sandstrom*—"permissive inferences."

different burdens of production and persuasion for simple defenses and affirmative defenses. It also uses the term "justification" to apply to certain defenses, without using the word "defense" in the definitions of those justifications, and then fails to define the burdens of production and persuasion for justifications clearly. Presumably, the rules for non-affirmative defenses would apply to justifications, but nowhere does the current code make that obvious.

Rather than carry forward this confusion, the Proposed Code only uses the term "defense," apart from the general defenses of "justification defenses," "excuse defenses," and "nonexculpatory defenses." Each of the general defense chapters contains a governing section that sets the burden of persuasion for the defenses contained in that chapter. Those burdens are referenced throughout Section 106(b) for maximum clarity. *See* also Section 108 [Definitions] and corresponding Commentary. Aside from those specific provisions, Section 106 contains a single rule for any defense: the defendant bears the burden of production, and the burden of persuasion by a preponderance of the evidence. This makes sense because the defendant benefits from the defense. Note that the burden of production for every defense in the Proposed Code rests with the defendant, under Section 106(c)(2).

Caveat Regarding Future Legislation. The relationship in the Proposed Code between defenses, mitigations, exceptions to liability is meaningfully different from that in current Delaware law. Additionally, the Proposed Code specifies the burdens of proof required for each class of general defenses—something the current code does not. In the future, designating a provision as an exception, mitigation, or defense will have clearly stated consequences in terms of the parties' burdens. Care should be taken in making those designations in future criminal legislation.

Comment on Section 107. Words of Gender or Number

Corresponding Current Provision(s): 11 Del. C. § 223

Comment:

Generally. The Proposed Code is drafted to be as precise as possible when using words indicating the singular or plural, and to be gender neutral whenever possible. This provision is included to protect against typos or inconsistent drafting in future legislation.

Relation to current Delaware law. Section 107 directly corresponds to 11 Del. C. § 223.

Comment on Section 108. Definitions

Corresponding Current Provision(s): 11 Del. C. §§ 204(a)(1), 221(a)–(b), 304(c), 1109(4)

Comment:

Generally. Section 108 collects the definitions for terms that are most frequently used in Chapter 100. Because this is the first definitions section in the Proposed Code, Section 108 also contains definitions for terms that are so ubiquitous that their definitions should appear as early in the Code as possible.

Relation to current Delaware law. Sections 108(a)-(c) and (f) contain definitions for the terms "defense," "exception to liability," "general defense" and "mitigation" which are used throughout the Proposed Code. Note that the definition of the term "defense" differs from the

meaning of the term in current law. *See* also commentary to Section 106 [Burdens of Proof; Permissive Inferences].

Sections 108(d) and (e) contain definitions for the terms "include" and "means" as they are used to define terms throughout the Proposed Code. They are taken directly from 11 Del. C. §§ 221(a) and (b).

Section 108(g) defines the term "person," which is used constantly throughout the Proposed Code. The definition directly corresponds to 11 Del. C. § 222(21).

Section 108(h) defines the term "property," which is used constantly throughout the Proposed Code, and should be interpreted as broadly as possible to ensure all kinds of tangible and intangible property are included. Current law does not provide a definition for property.

Comment on Section 109. Definitions Index

Corresponding Current Provision(s): Various

Comment:

Generally. Section 109 catalogues every defined term used in the Proposed Code. Whenever a defined term is used in the Code, a reference to the section defining the term is provided at the end of that Section. In addition to ensuring that key terms' definitions are always easy to find, this format has the additional benefit of signaling right in the text of each section which terms are defined terms. Every term is defined in the definitions section at the end of the chapter that either: (1) relies on the term most heavily; or (2) uses the term first.

Relation to current Delaware law. The introductory language to Section 109 provides that "[a] word not defined in this Code has its commonly accepted meaning." This corresponds directly to 11 Del. C. § 221(c).

For a discussion of the relationship between the Proposed Code's defined terms and current law, refer to the Commentary for the provision in which each term is defined.

REQUIREMENTS OF OFFENSE LIABILITY

CHAPTER 200. BASIC REQUIREMENTS OF OFFENSE LIABILITY

Section 201. Basis of Liability
Section 202. Offense Elements Defined
Section 203. Causal Relationship Between Conduct and Result
Section 204. Requirement of a Voluntary Act; Omission Liability; Possession Liability
Section 205. Culpability Requirements
Section 206. Ignorance or Mistake Negating Required Culpability
Section 207. Mental Illness or Disorder Negating Required Culpability
Section 208. Consent
Section 209. Customary License; De Minimis Infractions; Conduct Not Envisaged by General Assembly as Prohibited by the Offense
Section 210. Conviction When the Defendant Satisfies the Requirements of More than One Offense or Grade
Section 211. Accountability for the Conduct of Another
Section 212. Voluntary Intoxication
Section 213. Divergence Between Consequences Intended or Risked and Actual Consequences
Section 214. Definitions

Comment on Section 201. Basis of Liability

Corresponding Current Provision(s): None

Comment:

Generally. This provision establishes the bases of liability for an offense under the Proposed Code. Section 201 makes clear the relevance and function of the other specific Chapters of the Code in relation to the determination of criminal liability for offenses contained both within and outside of the Proposed Code. Section 201(a) provides that an actor may be liable for an offense only if she satisfies all of its elements, except where a provision in Section 211 through 214 operates to impute a missing element. Section 201(a)(1) also clarifies that liability may not be imposed where the defendant satisfies the requirements of any bar to liability (whether defined as a defense, exception to liability, or other rule). Section 201(b) provides that the defenses set forth in Chapters 300-500 will preclude liability even though all of an offense's elements are satisfied or imputed. Such provisions differ from the bars to liability covered by Section 201(a) in that they present general, rather than special, defenses (and thus apply to *any* offense, rather than to a particular offense or group of offenses).

Relation to current Delaware law. The principles expressed in Section 201 reflect the current understanding of the basis of criminal liability in Delaware. No current provision in Title 11 contains an explicit statement of the material in Section 201.

Comment on Section 202. Offense Elements Defined

Corresponding Current Provision(s): 11 Del. C. § 232; *see also, e.g.*, § 251

Comment:

Generally. This provision categorizes and defines offense elements in terms of conduct, circumstances, results, and culpability requirements. Defining offense elements in this manner enables a systematic and clear approach to offense definition. Specifically, the offense element definitions aid in defining culpability requirements, which can be more precisely identified by their application to each type of offense element.

As Section 202(a)(2) makes explicit, offense elements may appear not only in the offense definition itself, but also in the provisions that define the offense grade, or otherwise specify a level of liability that will attach to the offense. *Cf. Apprendi v. New Jersey*, 530 U.S. 466 (2000) (establishing a constitutional rule that facts affecting a defendant's potential maximum punishment are offense elements and must be proved to a jury beyond a reasonable doubt). Section 202(a)(1) defines an offense's "objective elements." This term distinguishes an offense's conduct, circumstance, and result elements from its culpability requirements. The distinction makes it clear that the culpability requirements set out in proposed Section 205 apply only to an offense's objective elements.

Relation to current Delaware law. Current Delaware law in 11 Del. C. § 232 defines "elements of an offense" similarly to proposed Section 202(a) to include acts, circumstances, results, and "states of mind." However, none of the objective elements are specifically defined in current law, which they are in proposed Section 202(a). Additionally, the Proposed Code uses the term "culpability" throughout instead of "state of mind," which appears throughout current Delaware law. *See, e.g.,*, 11 Del. C. § 251. The Proposed Code adopts the term "culpability" because it is a more accurate term when using negligence as a possible basis of liability. Negligence is the culpable absence of a specific state of mind. The law expects a person to have a certain awareness of her surroundings and the consequences of her actions, and may punish a person for failing to have such an awareness.

Comment on Section 203. Causal Relationship Between Conduct and Result

Corresponding Current Provision(s): 11 Del. C. §§ 261, 262, 263; *see also* § 264

Comment:

Generally. This provision specifically defines the minimum causal nexus between given conduct and its attendant results that will allow imposition of criminal liability for the conduct.

Relation to current Delaware law. Section 203(a) establishes the general framework of determining causation. Subsection (a)(1) directly corresponds to 11 Del. C. § 261, establishing that the conduct must be the factual, or "but-for," cause of the result an offense prohibits. Subsection (a)(2) imposes an additional "proximate cause" requirement that is derived from 11 Del. C. §§ 262(2) and 263(2). The provisions allowing liability where the result "is not too remote or accidental in its occurrence to have a bearing on the actor's liability or on the gravity of the offense" are borrowed from Model Penal Code § 2.03. Although it expresses the concept of proximate cause, current Delaware law presents the issue of proximate cause as a function of

the defendant's culpability as to causing the prohibited result. Additionally, it requires that the actual result involve the same kind of injury or harm as the probable result of the defendant's conduct. Delaware's current approach creates two problems. First, it is ambiguous what harms should be considered the "same kind of harm" as the probable result of the defendant's conduct. Nevertheless, similarity of harms must be proven. Second, Delaware's approach creates ambiguity as to whether the prosecution has to prove the defendant's culpability as to the *manner* of causing a particular result, or merely as to the result itself. Subsection (a)(2) proposes to solve both problems by divorcing the proximate cause requirement from the notion of culpability, and instead focusing entirely on the strength of the connection between the defendant's act and the prohibited result.

Note that broadening the application of a proximate cause requirement makes 11 Del. C. § 264 unnecessary. That provision established a general proximate cause requirement for strict liability offenses. But, because Section 203(a)(2) applies to all offenses, no special provision needs to be made for strict liability offenses.

Subsection (a)(3) requires satisfaction of any additional causation requirements imposed elsewhere (including the offense definition itself). Subsection (a)(3) has no explicit analogue in current Delaware law, but expresses the implied principle that the General Assembly is free to impose more specific requirements for particular offenses. For example, the General Assembly could require that a particular offense's result element occur within a certain amount of time.

Likewise, Section 203(b) is not based upon a current section of the Delaware Code. Yet, it addresses the important causal problem where more than one person contributes to a prohibited result, and each person's conduct alone would have caused the result. In those situations, Subsection (b) treats each person as having caused the result. This provision prevents equally blameworthy persons from escaping liability due to the fortuity that someone else independently caused the prohibited result. Delaware courts have long held that concurrent sufficient causes should not allow a blameworthy person to escape liability. *See, e.g., Fioretti v. State*, 245 A.2d 170 (Del. 1968) (holding that the trier of fact need not find that the defendant was the sole proximate cause of a collision to find the defendant guilty of involuntary manslaughter, where the collision caused an automobile passenger's death).

Comment on Section 204. Requirement of a Voluntary Act; Omission Liability; Possession Liability

Corresponding Current Provision(s): 11 Del. C. §§ 242, 243

Comment:

Generally. Section 204 sets the minimum conduct requirements for criminal liability. A fundamental principle of criminal law holds that it is inappropriate to punish "mere thoughts" unaccompanied by a physical act or a failure to discharge a specified legal duty. Section 204(a) prohibits liability absent an overt act or a failure to perform an act that the person is physically capable of performing. Furthermore, Section 204(b) provides that, as a general matter, an offense's conduct element may be satisfied by either an affirmative act or a failure to perform a legal duty. Section 204(c) defines the circumstances under which possession is considered a "voluntary act" for the purposes of criminal liability.

Relation to current Delaware law. Section 204(a) directly corresponds to 11 Del. C. § 242. Section 204(b), however, is new, and not based on any current Delaware statute, but rather on the Model Penal Code's § 2.01(3)(b). Delaware law does not explicitly require that a person have a duty to act before failure to act can become the basis of criminal liability. 11 Del. C. § 242 merely requires that the defendant must have been "physically capable" of acting. This creates a material ambiguity about the criminal liability of bystanders. Specifically, it raises the question of whether there is an implied duty to aid victims or prevent crimes when possible, and whether failure to aid or prevent crime can support criminal liability, absent an explicit duty to do so created elsewhere in the law. Because a general duty to aid would have wide-ranging consequences, one would expect it to be explicitly stated by statute, which it is not in § 242. Therefore, rather than resolving this ambiguity in favor of a general duty to aid, Subsection (b) resolves it in favor of requiring a legal duty to act before failure to act can support criminal liability. Note also, that while Section 204(b) is based on MPC § 2.01(3)(b), its formulation diferrs from that of the Model Code. While the Model Code establishes that liability cannot be based on omissions unless a duty to act is imposed by law, the Proposed Code directly states that liability can be based on omissions if a duty to act is imposed by law.

Sections 204(c) and (d) directly correspond to 11 Del. C. § 243.

Comment on Section 205. Culpability Requirements

Corresponding Current Provision(s): 11 Del. C. §§ 231, 251, 252, 253, 254, 255, 307; *see also* §§ 231(d), 454.

Comment:

Generally. Section 205 does two important things. First, it defines four culpability requirements—intent, knowledge, recklessness, and negligence—as they relate to each type of offense element: conduct, circumstances, and results. Second, it establishes rules governing the application of culpability requirements to objective elements.

Section 205(a) specifies that some level of culpability is normally required as to each objective element of an offense. (Note that, under Section 202(a), this and Section 205's other requirements apply to those elements defined in the grading provisions, as well as to elements appearing in the offense definition itself.)

Section 205(b) specifies what those levels of culpability are. The Proposed Code uses four culpability levels, exclusively, which is the norm for modern criminal codes.

Section 205(c) provides a general rule that a stated culpability requirement for one objective element governs later objective elements as well, to avoid unnecessary repetition.

Section 205(d) provides a "read-in" culpability requirement of recklessness where no culpability level is specified (either through direct statement or through application of the rule in Section 205(c)), to avoid excess verbiage and ensure that offenses, or offense elements, do not allow strict liability for want of an explicit culpability term for each element.

Section 205(e) sets prerequisites for imposition of strict liability.

Section 205(f) establishes that culpability as to the criminality of one's conduct is not required unless the offense definition so provides. For example, one need not know specifically that one is committing a crime, or intend to commit "a crime" *per se*, to be subject to liability.

Section 205(g) points out that the requirement of a given culpability level is satisfied by proof of a more serious culpability level. Note that the drafting of Section 205(b) accounts for the application of Section 205(g), in order to avoid inconsistencies. For instance, in order to prove "knowledge" as to a circumstance, Subsection (b)(2)(B) requires a belief in high probability that the circumstance exists. Since Subsection (g)(3) allows to prove "knowledge" by proving intent, "intent" as to circumstance must not be defined as merely a belief (in low probability) that the circumstance exists. Such definition would paradoxically make "intent" easier to prove than "knowledge" and transform the more demanding requirement for "knowledge" as to a circumstance in Subsection (b)(2)(B) to a dead letter. Therefore, in order to prove "intent" as to a circumstance, Subsection (b)(1)(B) also requires a belief in high probability that the circumstance exists. However, Subsection (b)(1)(B) contains a different alternative for "intent" as to circumstance, by proving hope that the circumstance exists. This qualitatively different alternative can appropriately serve as a substitute for "knowledge" as to circumstance.

Relation to current Delaware law. Section 205(a) corresponds to 11 Del. C. § 251(a), which requires "proof that the person had the state of mind required by the law defining the offense." The language of § 251(a) implies there is only one culpability requirement that applies to all elements of an offense; but, that may not be the case. Therefore, Section 205(a) specifies that the culpability requirement as to every objective element must be satisfied, except where strict liability applies.

Section 205(b) is substantially similar to 11 Del. C. § 231, with a few changes. First, § 254 (dealing with conditional intent) is incorporated directly into the provision dealing with "intent" culpability, in Subsection (b)(1)(D). Second, § 255 (defining "knowledge" to include knowledge of a high probability) is incorporated directly into the provision dealing with "knowing" and "intentional" culpability as to circumstance elements, in Subsections (b)(2)(B) and (b)(1)(B). Third, and most importantly, Subsection (b) drops the current culpability of "negligence" in § 231(d). Subsection (b)(4) retains the content of the current definition of "criminal negligence" in § 231(a), but rebrands it simply as "negligence." Criminal negligence and tort—or ordinary—negligence are similar but distinct. In both cases, the actor fails to perceive a risk that harm will result from the actor's conduct, or that a circumstance exists. In both cases, the risk is one that the "reasonable person" would have perceived. But, in criminal negligence, the risk must be a "gross deviation" from the standard of care a reasonable person would have exercised in the actor's situation. This greater culpability is necessary to justify applying the coercive machinery of criminal law to a person's inattentiveness, because only truly blameworthy action should be condemned by criminal law. Just as a person's failure to act is only punished by criminal law if the person had a legal duty to act, a person's failure to perceive a fact should only be punished if it is so egregious that it justifies the creation of a duty to pay attention. Additionally, ordinary negligence is such a slight culpability requirement that it threatens to capture a variety of behaviors beyond those contemplated by the offense definitions. For these reasons, the Proposed Code does not use ordinary negligence as a culpability requirement.

Section 205(c) corresponds to § 252, but uses more common sense criteria. § 252 provides that any stated culpability in an offense definition applies to all elements of the offense "unless a contrary legislative purpose plainly appears." Use of grammatical clauses within an offense definition would suggest that a different culpability might apply, especially because (as discussed below) both the current and Proposed Codes read in recklessness wherever a

culpability requirement is lacking. Subsection (c) specifies that, as a default position, stated culpability requirements only apply to objective elements grouped together in the same grammatical clause. Any other objective elements that common sense would suggest were intended by the legislature to also fall under the stated culpability requirement will be treated that way under Subsection (c). Subsection (c) is preferable to § 252 because the legislature does not always carefully construct the culpability requirements in an offense. Having a stronger default rule will help maintain consistent and predictable culpability requirements in those situations, but without overriding any explicit legislative decisions.

Section 205(d) directly corresponds to § 251(b), establishing a default requirement of reckless culpability as to any objective element of an offense or grade provision that does not specify a culpability requirement. This provision is, perhaps, the most important provision in the entire Proposed Code. Requiring a defendant to have some culpable mental state before liability may be imposed sets criminal law apart from all other types of law, such as torts. Criminal law carries the stigma, and attendant social influence, of moral condemnation. That condemnation is misplaced—and, critically, the community living under the law sees it as misplaced—when a defendant can be convicted despite having a blameless state of mind. In modern criminal codes, punishment tracks a defendant's blameworthiness, which is in turn informed in large part by the defendant's culpability. For this reason, modern, culpability-based criminal codes eschew the use of strict liability (i.e., requiring no culpability).

However, current law in 11 Del. C. § 454 contains an exception to the default culpability provision of § 251(b), and imposes strict liability as a general principle in certain cases. Current § 454 provides that "it is no defense for an offense . . . which has as an element of such offense . . . the age of the victim that the accused did not know the age of the victim or reasonably believed the person to be of an age which would not meet the element of such offense . . . ." Subsection (d) does not retain that provision. It imposes strict liability as to the circumstance element of a victim's age—not as a specific carve-out in uniquely appropriate circumstances (for example, the age of victims of sexual offenses, as provided in proposed Section 1301(f)), but as a general principle of liability. This is a sweeping, categorical exception to a foundational principle of criminal law (as discussed in the previous paragraph), and not merely in the abstract. The principle of required culpability is foundational to Delaware criminal law *as it currently stands*. Current § 454 is arbitrarily inconsistent with the remainder of current Delaware law. It is arbitrary because there is no obvious reason why a victim's age—one of thousands, even millions, of possible circumstances that could be relevant to the seriousness of a particular offense—ought to receive unique treatment. Having an exception to culpability for a victim's age invites additional offense characteristics to be added as exceptions in the future, further degrading the consistency, rationality, and moral force of the criminal law.

Finally, the creation of such a general exception leads to an odd result. According to the United States Supreme Court ruling in Patterson v. New York, 432 U.S. 197, 217 (1977), it is unconstitutional for a State to shift the prosecution's burden of proving that an element of an offense exists to the defendant. In other words, a State is barred from creating even a *rebuttable* presumption about the existence of an offense element – including the presumption that the defendant was aware of the age of victim (or of any other offense characteristic). Yet, in effect, a general exception to the Code's culpability rule for offense elements involving a victim's age, creates an even more stringent, *irrebuttable* presumption. Such a general exception appears incompatible with the rationale of the ruling in *Patterson*. For all these reasons, Subsection (d) does not carry forward § 454.

Section 205(e) directly corresponds to § 251(c) by narrowly defining the situations where absence of a stated culpability requirement may impose strict liability. Note that offenses imposing strict liability are either violations or misdemeanors. These cannot be bootstrapped to establish liability for offenses of a higher grade. For instance, while a particular provision may establish a duty to act in a specific way without the need to prove culpability, the punishment for a failure to act according to that provision is appropriately defined by a violation grade. It cannot also be used to establish a duty to act for a different, more serious offense.

Section 205(f) is not specified in the current code; yet, it reflects Delaware's practice that the State need not prove an actor's culpability as to the existence or meaning of the law. Subsection (f) leaves open the possibility, however, that the General Assembly may choose to require culpability as to the existence or meaning of the law in a specific offense definition.

Section 205(g) directly corresponds with § 253, except as the latter relates to ordinary negligence, which is not used in the Proposed Code.

Section (h) is a simplified form of 11 Del. C. § 307 intended to avoid confusion over the fact that the State must that prove the defendant has any required culpability beyond a reasonable doubt. This provision allows the judge or jury to find a defendant's culpability or belief—which is inherently subjective—from circumstantial evidence in the case, rather than requiring direct evidence.

Comment on Section 206. Ignorance or Mistake Negating Required Culpability

Corresponding Current Provision(s): 11 Del. C. § 441(1); *see also* § 454

Comment:

Generally. Section 206 makes it explicit that an offense definition's requirements are not satisfied if a person's ignorance or mistake as to a fact or law negates a required culpability level. Section 206(c) addresses situations where a person has a mistaken belief, but is not entitled to a defense under Section 206 because, even under her mistaken view, she was committing an offense. In those cases, culpability as to the committed offense will be imputed based on the person's culpability as to the intended offense.

Relation to current Delaware law. Section 206(a) corresponds with the current defense in 11 Del. C. § 441(1). However, § 441 does not recognize mistakes of law, while Subsection (a) does. This change is necessary to avoid an arbitrary distinction between questions of fact and mixed questions of fact and law, which are just as likely to affect the actor's culpability level. Including mistakes of law is not inconsistent with proposed Section 205(f). As a general matter, no culpability must be proven as to the defendant's knowledge of the law; but, a defendant's mistake or ignorance of law might negate a culpability requirement applicable to an objective element of an offense. For example, whether something satisfies the definition of "property" for the purpose of theft is a legal issue, but a mistake on that point would not afford a defense under current law. In any case, the availability of a mistake defense under Subsection (a) is limited by the requirements of Subsection (b), which the current law does not specify.

Note that, absent specific provisions providing otherwise in offense definitions, Subsection (a) will govern the issue of culpability as to the age of victims. As discussed in the Commentary to Section 205(d), the Proposed Code does not carry forward the current provision in 11 Del. C. § 454 because it imposes strict liability, as a general default rule, as to knowledge

of a victim's age where the age of the victim is an element of an offense or grading provision. Having a default rule of strict liability that applies to all ages creates the real possibility of injustice at ages where a genuine mistake is most likely to occur. For example, an offense may only apply if the victim is less than 18 years of age. But 17-year-olds often do not look younger than 18-year-olds; many, in fact, can appear much older. The same would be true for older people. Throughout the current code, offense grades are increased for victims who are 62 years of age or older, yet still impose strict liability as to knowledge of that age. Many 62-year-olds appear much younger than their age, making a genuine mistake as to age highly likely. But, at the extremes, a genuine mistake is much less likely, making altered culpability rules easier to justify. This is what the Proposed Code does in Chapter 1300 for sexual offenses, where the age of victims is the most sensitive. Section 1305(a) provides that the only culpability that need be proven as to a victim's age is negligence—but that rule only applies to Chapter 1300. Additionally, Section 1301(c) imposes strict liability as to the age of victims less than 14 years of age, because it is extremely unlikely that a defendant could mistake a person less than 14 with a 16- or 18-year-old. Only in the most appropriate circumstances should strict liability be imposed, on a case-by-case basis—not as a general rule. The current code's approach to knowledge of age is an anomaly; strict liability is not generally imposed regarding any other issue.

Section 206(b) refines current law by explaining in detail the conditions under which a mistake "negates" an offense's culpability requirement. Subsection (b) categorizes mistakes as reckless, negligent, or reasonable. Just as there are different levels of culpability as to conduct, there are different categories of mistakes. If a person arrives at a mistake through culpability greater than or equal to the culpability required by the offense itself, the person's mistake should not exonerate her. In other words, a person's recklessness as to forming or holding a mistaken belief should not preclude liability where the offense definition itself requires only recklessness as the subject of belief. Accordingly, Subsection (b) states that a reckless mistake may negate only intention or knowledge; a negligent mistake negates intention, knowledge, and recklessness; and a reasonable—or non-negligent—mistake negates any level of culpability.

Section 206(c) has no corresponding provision in current Title 11. But, it is useful because it closes a potential loophole in both current law and Section 206's defense for a mistaken belief by holding a defendant liable for a resulting, unintended harm where the defendant intended to commit an offense of equal or greater severity.

Comment on Section 207. Mental Illness or Disorder Negating Required Culpability

Corresponding Current Provision(s): None

Comment:

Generally. Section 207 recognizes that a mental illness or disorder, like ignorance or mistake in proposed Section 206, may negate an offense's culpability requirement. Section 207 makes clear that evidence of mental illness or disorder may be relevant in contexts other than those covered by proposed Section 403's excuse defense for insanity and Section 504's nonexculpatory defense for persons unfit to plead or stand trial. For example, the insanity defense provides a freestanding excuse when a person satisfies all culpability requirements of the offense itself, but merits exoneration because she could not control her conduct or lacked substantial capacity to appreciate the wrongfulness of her act. Section 207, on the other hand,

would apply in cases where the person's mental incapacity prevented her from satisfying the offense's elements in the first place, as where an offense requires knowledge and the person's mental incapacity prevented her from "knowing" something another person might know. For example, where, due to a mental illness or disorder, a defendant enters another's home believing it to be her own, she would not satisfy all of proposed Section 2402's elements of trespass, in that she would lack the requisite knowledge that she entered a place where she had no license or privilege to be. In that case, the admissibility of evidence related to the defendant's mental illness or disorder should not rest on her ability to present sufficient evidence to properly raise an insanity excuse under Section 403.

Relation to current Delaware law. Although Section 207 has no corresponding provision in current Title 11, the Delaware Supreme Court has construed the current insanity excuse to address the question of whether mental illness undermines culpability, rendering the defendant's conduct not blameworthy. *Sanders v. State*, 585 A.2d 117, 123 (Del. 1990). The proposed insanity excuse in Section 403 is intended, however, to take effect in situations where the defendant does satisfy the culpability requirements of an offense. Section 207 is necessary, then, to ensure that all aspects of the current law are preserved as to the effect of mental illness upon criminal liability.

Comment on Section 208. Consent

Corresponding Current Provision(s): 11 Del. C. §§ 451, 452, 453

Comment:

Generally. Section 208 establishes rules governing when the consent of one who would otherwise be the victim of an offense will preclude criminal liability. Section 208(a) defines the general rule; Section 208(b) provides special rules for offenses involving bodily harm; and Section 208(c) defines the circumstances under which a person's agreement will not constitute valid, legal consent. Note that although a defense of consent, subject to the rules in Section 208, is normally available for all offenses, some offenses contain an element that the prohibited conduct be performed without the victim's consent. In those cases, lack of consent must be proven by the prosecution beyond a reasonable doubt, just like any other element of an offense.

Relation to current Delaware law. Section 208(a) directly corresponds to 11 Del. C. § 451. Yet, it does not include § 451(1), specifying that the rule only applies where physical injury is not involved, because specific requirements for those situations are laid down in Subsection (b), and more specific requirements always control more general requirements applying to the same circumstances. Subsection (a) also does not preserve § 451's provision that a "person who enters the presence of other people consents to the normal physical contacts incident to such presence." This is because normal contacts incident to one's presence among other persons does not constitute an offense; therefore, no explicit provision of consent is necessary. If a contact is made negligently or recklessly, it has to involve actual physical injury to be an offense—in which case, it is not a "normal," incidental contact. If the contact is made intentionally, the contact still must be of an offensive or alarming nature under Section 1202(a)(3) of the Proposed Code to be an offense. Again, this is not a "normal," incidental contact.

Section 208(b), setting forth specific rules that determine when consent to physical injury is effective, directly corresponds to 11 Del. C. § 452.

Section 208(c)(1)-(c)(4), defining the circumstances under which a person's agreement will not constitute valid, legal consent, directly corresponds to 11 Del. C. § 453. Subsection (c)(1), however, removes the provision that consent by a legally incompetent person is not a defense "unless the defendant *believes* the victim is legally competent" (emphasis added). This exception in current law does not even require that the defendant's belief in the victim's competence be a reasonable belief. Any subjective belief would do; but this seems to contradict the purpose of making incompetent persons' consent ineffective in the first place. It is the person's status that makes the consent invalid, which is an objective requirement.

Section 208(c)(5) proposes an additional circumstance where agreement should not be considered valid consent. That circumstance is agreement to submit to a surgical procedure, but where the procedure is not performed by a person who is licensed to perform it. This captures situations where surgery is performed by a medical professional, but one who is not licensed to perform the surgery at issue, as well as situations where the "surgeon" is not a medical professional at all. But, this provision does not cover "gray" areas where a procedure arguably is not surgery, and where persons other than medical professions are authorized by law to perform such procedures. For example, Subsection (c)(5) does not invalidate consent to receiving a piercing at a tattoo parlor, or consent to being circumcised by a mohel.

Comment on Section 209. Customary License; De Minimis Infractions; Conduct Not Envisaged by General Assembly as Prohibited by the Offense

Corresponding Current Provision(s): None

Comment:

Generally. This provision sets out defenses—actually modifications of the meaning of the underlying offense definitions—for persons whose conduct was within a customary license, was too insignificant to merit criminal punishment, or did not cause the harm contemplated by the offense's existence. These provisions enable the court to dismiss prosecutions on these bases, creating an additional safeguard beyond the usual reliance on prosecutorial discretion. These defenses are to be presented to, and ruled on by, the court before trial, rather than to the jury at trial. Most jurisdictions, following the Model Penal Code's Section 2.12, contain such "safety net" provision.

Relation to current Delaware law. Section 209 has no corresponding provision in current Title 11. Section 209's defenses are consistent, however, with the well-accepted rule of construction that a statute should not be interpreted to produce an absurd result.[2]

Section 209(a) provides that conduct may be exempt from liability if it is within a "customary license." For example, where a landowner had previously allowed his neighbors to use his yard as a shortcut, even though the yard was posted against trespassing, Section 209(a)

[2] *See, e.g., State v. Cooper*, 575 A.2d 1074, 1076 (Del. 1990) ("Literal or perceived interpretations, which yield illogical or absurd results, should be avoided in favor of interpretations consistent with the intent of the legislature."); *Spielberg v. State*, 558 A.2d 291, 293 (Del. 1989) ("[A] statute must be viewed as a whole, and literal or perceived interpretations which yield mischievous or absurd results are to be avoided."); *C. v. C.*, 320 A.2d 717, 722 (Del. 1974) ("[A] statute will not be construed so as to require an absurd or unworkable result.").

would provide a defense to the neighbors if the landowner unexpectedly decided to accuse them of criminal trespass. Section 209(a)'s defense is not available, however, where a license has been "expressly negated by the person whose interest was infringed" or is inconsistent with the relevant offense.

Section 209(b) recognizes a defense for conduct that, although technically constituting an offense, is too trivial to fairly warrant a criminal conviction. For example, one would technically commit an offense by taking a single stick of gum from a candy store; yet, a judge may determine that, under the circumstances, the condemnation of criminal conviction is too onerous a consequence for the loss of $0.10 worth of merchandise. Delaware courts have occasionally acknowledged that de minimis infractions should not support criminal liability. *See, e.g., J.C. v. State*, 2011 WL 5345407, at *4 (Del. Fam. Ct. Sept. 26, 2011) (reasoning that any annoyance caused by two text messages could not rise to a level that the General Assembly intended to prohibit by creating a harassment offense).

Section 209(c) provides a defense where one did not actually cause the harm or wrong at which the offense is aimed. For example, proposed Section 3204(a)(1) prohibits impersonation of a public servant. This would appear to reach a person who dresses up as a police officer on Halloween. Subsection (c) would allow the court to dismiss a prosecution based on such conduct, because it would not involve the sort of harm the offense aims to prohibit.

Note that the defendant bears the burden of persuasion and must prove these defenses by a preponderance of the evidence.

Comment on Section 210. Conviction When the Defendant Satisfies the Requirements of More than One Offense or Grade

Corresponding Current Provision(s): 11 Del. C. § 206

Comment:

Generally. Section 210 defines the circumstances under which the court may enter multiple convictions when a person's criminal conduct satisfies the requirements of more than one offense or grading provision. Importantly, this provision does not restate (or even directly relate to) the constitutional prohibition on double jeopardy, but is more comprehensive, addressing broad, general issues regarding the appropriateness of multiple liability that go beyond the Constitution's minimum requirements. Moreover, this provision does not address any procedural issues relating to how, or when, a jury is to be instructed regarding various offenses, such as "included offenses" of charged offenses. Section 210 speaks only to the issue of when multiple liability is appropriate and allowed under the Proposed Code.

Relation to current Delaware law. Section 210(a) provides the circumstances in which a court may not enter a judgment of conviction for both of two related offenses or grades of offenses of which the defendant has been convicted. All the corresponding circumstances in 11 Del. C. § 206(a)-(b) have been preserved, though they are structured differently and sometimes reworded for greater clarity and specificity. Subsection (a)(1)(A), dealing with offense harms entirely contained within each other, or simply dealing with different degrees of the same kind of harm, is based upon § 206(b)(1) and (b)(3).

Section 210(a)(1)(B)(i), which has no analogue in current Delaware law, bars multiple convictions where two offenses or grades differ only in that one prohibits a kind of conduct

generally and the other criminalizes a specific subset of the same conduct. The Proposed Code has been drafted to avoid overlap of this kind, but current Delaware law has offenses illustrating the desirability of such a provision. For example, 11 Del. C. § 812's "graffiti" offense differs from § 811's general property damage offense, "criminal mischief," only in requiring that property be damaged by a person who "draws, paints, etches or makes any significant mark or inscription" on the property. Section 210(a)(1)(B)(i) makes clear that convictions for both criminal mischief and graffiti, based on the same conduct, would be inappropriate.

Section 210(a)(1)(B)(ii), directly corresponding to 11 Del. C. § 206(b)(3), provides that multiple liability may not be imposed where two offenses or grades differ only in that "one requires a lesser kind of culpability than the other."

Section 210(a)(1)(C), which has no analogue in current Delaware law, bars multiple liability where an offense is defined as a continuing course of conduct and the offender's conduct is uninterrupted. For example, the proposed offense in Section 5104 prohibits enumerated groups of persons from possessing a firearm or deadly weapon. Section 210(a)(1)(C)'s rule makes clear that multiple convictions under Section 5104 would not be appropriate based upon a defendant's single, uninterrupted possession of the same weapon. Section 210(a)(1)(C) allows the General Assembly to override this general rule against multiple convictions, however, by expressly providing that specific periods of continuing conduct constitute separate offenses.

Section 210(a)(2)(A) corresponds to 11 Del. C. § 206(a)(2)—which bars conviction for both an attempt and the completed target offense—but extends the rule to solicitation as well. Current § 206 is silent as to whether a defendant may be convicted of conspiracy or solicitation as well as the completed target offense. All inchoate offenses address a similar harm—unsuccessful preparation toward completion of an offense, whether by taking a substantial step toward the offense (attempt), or soliciting or conspiring with another person to commit it. Once the target offense has been committed, however, the preparatory nature of the inchoate offense makes it irrelevant. At that point, only conviction of the target offense is appropriate. This understanding of inchoate offenses is reflected in Delaware's current approach to attempts, so Subsection (a)(2)(A) explicitly extends it to solicitation to ensure the criminal code remains internally consistent. Subsection (a)(2)(B), directly corresponding to 11 Del. C. § 206(b)(2), expands this rule to bar convictions for both an inchoate offense, and any offense that relates to the inchoate offense's target offense in such a way that Subsection (a)(1) would bar convictions for both of them. For example, Subsection (a)(2)(B) would preclude convictions (based upon the same conduct) for both assault in the first degree and attempted assault in the second degree, or attempted assault in the first degree and assault in the second degree.

Section 210(a)(3), barring convictions for multiple inchoate offenses toward a single substantive offense, has no corresponding provision in current Title 11. As a matter of policy, there is little justification for permitting convictions of multiple inchoate offenses toward the same substantive offense. A conviction of a single inchoate offense sufficiently punishes an offender for her incomplete efforts toward an offense. Assuming a court orders that sentences be served consecutively, Section 210(a)(3) is necessary to prevent the possibility of punishing an offender who does not complete an offense more severely than one who does.

Section 210(a)(4) codifies a rule that Delaware courts follow already: that a person cannot be convicted of the same offense twice, where one conviction is based upon her own conduct, and the other is based upon her complicity for another's conduct toward the same offense. Thus, where two people jointly commit the offense of home invasion, each may be convicted on one count of home invasion, but not for another count based solely on each one's

accountability for the other's conduct. *See Erskine v. State*, 4 A.3d 391, 394 (Del. 2010) ("A person may be convicted of an offense as a principal, based upon his own conduct, or as an accomplice to another person.").

Section 210(a)(5) directly corresponds to 11 Del. C. § 206(a)(3), which prohibits legally inconsistent simultaneous convictions.

Section 210(b), providing that convictions for conspiracy and the offense that is the target of the conspiracy merge for sentencing purposes, reflects a similar understanding of inchoate liability as discussed in the Commentary to Subsection (a)(2)(A) above. Yet, given the unique harm to society caused by conspiratorial, organized approaches to criminality, Subsection (b) allows a defendant to be convicted of both a conspiracy and its target offense. This sets conspiracies apart from the other inchoate offenses of attempt and solicitation, for which only one conviction may be entered (either for the inchoate or completed offense).

Section 210(c) is a recommended addition to the scheme of multiple convictions that draws attention to the intentional structure of the Proposed Code. In consolidating related or overlapping offenses from the current code, the Proposed Code sometimes presents multiple related offenses within the same Section. This has been done intentionally to make clear that those offenses are related in such a way that they should be viewed as alternatives to each other—at least as far as multiple convictions are concerned. For example, both offenses for dissemination of child pornography and dissemination of pornography (obscenity) are grouped together under proposed Section 4204. This grouping is intentional, and is meant to signal that, among other things, a single instance of disseminating child pornography should not also support a conviction for disseminating pornography. Section 210(b) makes the effect of these groupings explicit. Yet, multiple offenses are sometimes grouped within the same Section for a completely different reason, such as offenses' common relationship with a regulatory requirement, as in proposed Section 5108. Therefore, Subsection (b) is not an absolute rule, but rather a factor to be considered by the court when deciding whether multiple charges based on the same conduct ought to support multiple convictions.

Section 210(d) makes clear that where multiple convictions conflict and only one may be entered into judgment, the court must enter a conviction for the most serious of those offenses (or the more serious of two grades of the same offense).

Note that Section 210 does not include 11 Del. C. § 206(c), which makes some provision for when the court is obligated to instruct the jury as to "included offenses." This provision is not retained in the Proposed Code because it is bound up in the larger issues of how and when juries ought to be instructed, none of which is contained within the Proposed Code. Rather, § 206(c) should be relocated to a chapter on criminal procedure dealing with those issues in greater depth. Additionally, Section 210 makes it unnecessary to carry forward 16 Del. C. § 4766, which specifies which current drug offenses are lesser-included offenses of each other, because the rules set forth are comprehensive enough to cover those situations without enumerating them.

Application to Grade Adjustments. The Proposed Code differs from the current Delaware criminal code by utilizing grade adjustments—some generally applicable, as in proposed Section 804, and some specific to offenses—as much as is practicable. This provides a principled approach to avoid multiplying liability for overlapping offenses while ensuring that greater harms are graded more seriously. Yet, use of so many grade adjustments could nevertheless result in improper multiple charges if the elements of a grade adjustment to one offense overlap with the elements of a separate offense. To avoid this problem, Section 210 should be read

broadly to apply to all elements of any offenses and attending grade adjustments charged against a defendant.

Comment on Section 211. Accountability for the Conduct of Another

Corresponding Current Provision(s): 11 Del. C. §§ 271, 272, 273, 274, 275, 533

Comment:

Generally. This provision sets out the circumstances under which one person may be held accountable for the conduct of another person.

Relation to current Delaware law. Section 211(a)(1) is similar to the current complicity provisions in 11 Del. C. § 271(1)-(2), defining two standards for liability: the first applies where the defendant's assistance is a "but-for" cause of the crime; the second applies where the defendant's objective contribution to the crime is less substantial, but the accomplice has the culpability of "intent" as to her assistance. Besides restructuring the two bases of liability, two changes have been made to § 271:

(1) The mental state elements of the current provisions have been rephrased. The phrase "having the culpability required by the offense" replaces "[a]cting with the state of mind that is sufficient for commission of the offense" in § 271(1), and has been added to Section 211(a)(1)(A). The imputation of one person's conduct to another person should not alter the culpability level required by the offense. Rather, the person held accountable for another's conduct should satisfy the standard culpability level for the underlying offense—no more, no less. "State of mind" from § 271(1) is replaced by "culpability" to maintain consistent terminology throughout the Proposed Code.

The phrase "[i]ntending to promote or facilitate the commission of the offense" in § 271(2) has been changed to "intentionally" in Section 211(a)(1)(B)(ii). The current phrasing is confusing, as it is unclear whether the requisite "intent" relates to the person's *conduct* in helping the confederate, or to the desired *result* of that help (commission of the offense). The new wording makes clear that only the conduct must be intentional. The culpability level as to the completed offense, on the other hand, is the same as it would be if the "helper" committed the offense herself. Note also that in order to promore clarity on this point, Section 211(a)(1)(B)(ii)(bb) slightly rewords § 271(2)c. Yet, the substance of that provision is retained, and Subsection (a)(1)(B)(ii)(bb) makes clear that a failure to make a proper effort to prevent the commission of an offense by persons having a legal duty to do so, amounts to complicity under the Proposed Code.

(2) The phrase "[a]ids, counsels or agrees or attempts to aid" has been replaced with "aids, solicits, or conspires with" in Section 211(a)(1)(B)(ii)(aa). "Conspires with" is a legal term of art that is defined elsewhere in the Code, and is much more precise than "agrees." "Counsel" is a form of aid, and is redundant with that concept except insofar as "counsel" can be construed as solicitation—counseling another to commit the crime, not how to commit the crime. Therefore, "solicits" is substituted. Finally, "attempts" to aid are now addressed in Section 211(g)-(h).

Section 211(a)(2) directly corresponds to § 271(3).

Section 211(b), setting out enumerated exceptions to accomplice liability under Subsection (a), is taken nearly verbatim from 11 Del. C. § 273.

Section 211(c), though slightly reworded for clarity, is taken directly from 11 Del. C. § 272(3). Subsection (c) provides that a person who may have been legally incapable of committing an offense herself may still be convicted of the offense based on her accountability for the conduct of another who commits the offense. But, the person nevertheless cannot be treated as an accomplice if that liability would be inconsistent with the purpose of the person's legal incapacity. For example, 11 Del. C. §§ 783(1) and 783A(1) criminalize kidnapping for ransom or reward. The Delaware General Assembly has chosen (though not all states make the same choice) not to criminalize payment of the ransom demanded by kidnappers, but to only criminalize the demand for ransom. Payment of the ransom, though, arguably could satisfy the requirements to be found liable as an accomplice to the kidnapping, because payment of the ransom intentionally aided completion of the offense. But this use of accomplice liability circumvents a policy decision made by the General Assembly not to criminalize payment of ransom. Subsection (c), in part, provides a statutory mechanism to avoid that improper outcome.

Section 211(d) is largely the same as § 272(2), which provides that a person may be held legally accountable for the conduct of another, even if the other person is never prosecuted or convicted, is convicted of a different offense or degree of offense, or has been acquitted of the offense. These categories are broad enough to capture other situations the current provision makes explicit, such as the "immunity from prosecution" provision and all of § 272(1), because those merely lay out reasons why a person might not be prosecuted or convicted, or might be acquitted. Therefore, those provisions are not retained in Subsection (d).

Section 211(e), though restructured for clarity, directly corresponds to 11 Del. C. § 274. Subsection (e)(1) makes clear that only the principal's conduct may be imputed to the defendant charged under Section 211(a)—not the principal's culpability in committing the offense. Subsection (e)(2) makes clear that specific aggravating factors that may increase the grade of an offense, or brings the principal's conduct under a different offense than the one contemplated by the accomplice, cannot be imputed to the accomplice. For example, if an accomplice assists a principal in committing a robbery, but the principal unexpectedly displays a deadly weapon in commission of the robbery, only the principal could be convicted of aggravated robbery under proposed Section 1201. The accomplice could only be held accountable for the robbery, not the aggravating circumstance of displaying a deadly weapon. But, if the accomplice's aid consisted of supplying the deadly weapon to the principal, then the accomplice would be personally accountable for the aggravating circumstance, allowing the accomplice to be convicted of aggravated robbery.

Section 211(f) directly corresponds to 11 Del. C. § 275. Subsection (f) allows a person indicted as a principal to be convicted as an accomplice, and vice versa.

Section 211(g) directly corresponds to 11 Del. C. § 533. Subsection (g) makes clear that liability (for an inchoate offense) is appropriate where a person satisfies the requirements of Section 211(a), even if the person for whose conduct she would have been accountable does not commit the offense. Subsection (g) imposes reduced liability in recognition of the fact that the harm of the substantive offense does not occur in those situations.

Section 211(h) has no corresponding provision in current Title 11. Subsection (h) has been added mainly to clarify the Proposed Code's position on a confusing issue of law—the interaction between attempt and complicity. Section 211(h) is similar to 11 Del. C. § 271(2)b. in imposing liability for an "attempt to aid," but with a few modifications. Subsection (h) applies "whether or not the offense is attempted or committed by the other person," thus clarifying that one is subject to liability for an unsuccessful attempt to aid, solicit, or conspire with another.

Subsection (h) also imposes liability for attempts to solicit or conspire as well as attempts to aid. Finally, Subsection (h) recognizes—as current Delaware law generally does—that inchoate efforts toward an offense should not be sanctioned as severely as completed offenses. Current § 271(2)b. imposes liability for someone who "[a]ids, counsels or agrees *or attempts to aid* the other person," implying that a failed attempt to aid might be punished as severely as the completed offense. This interpretation, however, is inconsistent with the approach taken in 11 Del. C. § 533, discussed above, which imposes only attempt liability in cases of incomplete complicity. Equal punishment based solely on the defendant's blameworthy intent—a wholly subjective approach to punishment—was first established by the Model Penal Code. Delaware generally adopted the Model Penal Code in its 1972 criminal code, but discarded many aspects of its subjectivist approach. *See, e.g.*, 11 Del. C. §§ 501–03, 511–13, 533 (punishing solicitation, conspiracy, and incomplete complicity less severely than the target offenses). Subsection (h) improves consistency throughout the Code by eliminating a possible remnant of the subjectivism rejected by the General Assembly. Subsection (h) therefore reduces the liability for attempted complicity relative to actual complicity.

Comment on Section 212. Voluntary Intoxication

Corresponding Current Provision(s): 11 Del. C. §§ 421, 424

Comment:

Generally. This provision governs the imputation of culpability to a person who engages in offense conduct after voluntarily becoming intoxicated. For conduct performed under the influence of *involuntary* intoxication, see proposed Section 404 and corresponding Commentary.

Relation to current Delaware law. Section 212(a)-(b) seek to reestablish the availability and contours of a defense for voluntary intoxication as it was originally enacted with the 1972 criminal code. Proposed Section 212 provides that voluntary intoxication is a defense, but only to the extent it negates a culpability requirement greater than recklessness, as did the original § 421 enacted in 1972 and the Delaware case law before that enactment. *Wyant v. State*, 519 A.2d 649, 655 (Del. 1986). Once the rule was codified, however, it came under repeated attack. By 1976, the General Assembly settled upon the current rule, which provides that voluntary intoxication "is no defense to any criminal charge." 11 Del. C. § 421. "The consequence . . . is that the State is not required to prove that an intoxicated defendant possessed a particular state of mind . . . ." *Wyant*, 419 A.2d at 658. The General Assembly was no doubt concerned that opening the door to a statutory involuntary intoxication defense in any circumstance would result in defendants raising the issue of intoxication in every case.

By removing the availability of the defense altogether, however, the General Assembly inadvertently created the possibility of a defendant who behaved recklessly being punished for knowing or intentional conduct. Suppose a defendant killed another person while drunk. Suppose also that the defendant's conduct was merely reckless, but the State nevertheless chooses to prosecute the defendant for aggravated murder. The defendant may not raise the issue of his intoxication to explain why he did not have the required culpability for aggravated murder. If the defendant has no other evidence to present, then the State's allegation of an intentional killing will go unchallenged by the defendant. The State must still prove the defendant's culpability beyond a reasonable doubt. But if the defendant is unable to make a colorable defense, the

State's assertion is much more likely to be accepted, even if the defendant did not in fact have the required culpability, and would not even if he had been sober. This same scenario could play out for any offense with knowing or intentional culpability.

At the same time, a defendant should not be able to hide behind his intoxication when he would have had the required culpability for an offense but for the intoxication. That is why Subsection (b) provides that recklessness may be imputed to any defendant who is voluntarily intoxicated, so long as the defendant would have been aware of the risks he took had he been sober. In this way, Section 212 strikes a balance that helps ensure that the greatest number of blameworthy offenders will be held accountable, but without arbitrarily subjecting those people to heightened punishment against which they are unable to defend.

Comment on Section 213. Divergence Between Consequences Intended or Risked and Actual Consequences

Corresponding Current Provision(s): 11 Del. C. §§ 262, 263

Comment:

Generally. Section 213 addresses the "transferred intent" situation where a person intends, foresees, or risks one result that would be an offense, but ends up causing or risking another result that is also an offense. In that case, liability may be imposed for the unintended offense that actually results. Note that where a person causes *both* the intended result *and* another result that is also an offense, he or she may be held liable for both offenses. Where the intended result does not occur, the person may be held liable for attempting to commit the intended offense as well as for committing the unintended offense.

Section 213(a) uses the term "consequence" instead of "result" because, in some cases, it may not be immediately clear whether an offense element is a circumstance element or a result element, as those terms are defined in proposed Section 202. For example, if an offense prohibits "sexual intercourse with a minor," it is unclear whether the result requirement is "sexual intercourse" and the person's age is merely an attendant specific circumstance, or whether the result requirement is "sexual intercourse with a minor" specifically. Section 213(b) avoids this ambiguity by including the attendant circumstances within the definition of "consequence."

Relation to current Delaware law. Section 213(a) is a combination of the current provisions for transferred intent in 11 Del. C. §§ 262-63, except for the portions dealing with proximate cause, which have been included in proposed Section 203. As discussed above, and for those reasons, the term "consequence" is substituted for the current term "result."

Comment on Section 214. Definitions

Corresponding Current Provision(s): 11 Del. C. §§ 243, 424

Comment:

Generally. This Section provides definitions of key terms used in this Chapter.

Relation to current Delaware law. Section 214(a) defines a "circumstance element" as any objective element that is not a conduct or result element. Most offenses will have one or

more circumstance elements that define the requisite conditions for a given act and result to generate criminal liability. For example, the offense of arson found in proposed Section 2301 requires damage to a "building." The term is not specifically defined in current Delaware law.

Section 214(b) defines a "conduct element" as any element of an offense that requires a person's "act" (as defined in Section 204) or "failure to perform a legal duty." For example, under proposed Section 2301, the offense of arson requires that a person "damage[]" property; any physical act or failure to perform a legal duty leading to such damage will satisfy the conduct element. (The causation and culpability requirements, however, will operate to limit the range of conduct for which a person will be criminally liable.) The term is not specifically defined in current Delaware law.

Section 214(c) provides a definition of the term "consequence" that avoids the ambiguity between when an offense element is a result element or a circumstance element. The term is not specifically defined in current Delaware law.

Section 214(d) defines the term "inchoate offense." The term is not specifically defined in current Delaware law.

Section 214(e) provides a definition of the term "intoxication" that directly corresponds to the definition currently found in 11 Del. C. § 424. But, based upon the Model Penal Code's definition of "intoxication" in § 2.08(5)(a), the proposed definition provides that intoxication includes disturbance of physical capacity, not merely mental capacity. This minor change takes into account the real-world possibility that an intoxicant affects a person's ability to control his or her physical actions, regardless of what the person's mental state might be otherwise.

Section 214(f) provides a definition of a "negligent mistake" that requires that the actor be "negligent" in forming or holding an erroneous belief.

Section 214(g) provides a definition of a "reasonable mistake" that applies to erroneous beliefs that an actor holds neither recklessly nor negligently.

Section 214(h) provides a definition of a "reckless mistake" that requires that the actor be "reckless" in forming or holding an erroneous belief. The definitions in Sections 214(f), (g), and (h) are intended to incorporate by reference Section 205(b)'s definitions of the culpability levels of recklessness and negligence. Whether a mistake is reckless, negligent, or reasonable is to be determined with reference to the standards in Section 205(b)(3) and (b)(4). None of the terms in Section 214(f), (g), and (h) are specifically defined in current Delaware law.

Section 214(i) defines a "result element" as any change in the state of the world required to have been caused by a person's conduct. For example, the offense of arson found in proposed Section 2301 requires the result of damage. The term is not specifically defined in current Delaware law.

Section 214(j) defines the term "substantive offense." The term is not specifically defined in current Delaware law.

Section 214(k) defines a "voluntary act" and, together with Section 204(c), directly corresponds to 11 Del. C. § 243.

Section 214(l) provides a definition of the term "voluntary intoxication" that directly corresponds to the definition currently found in 11 Del. C. § 424.

GENERAL DEFENSES

CHAPTER 300. JUSTIFICATION DEFENSES

Section 300. General Defenses

Section 301. General Provisions Governing Justification Defenses
Section 302. Choice of Evils
Section 303. Execution of Public Duty
Section 304. Law Enforcement Authority
Section 305. Conduct of Persons with Special Responsibility for Care, Discipline, or Safety of Others
Section 306. Defense of Person
Section 307. Defense of Property
Section 308. Definitions

Comment on Section 300. General Defenses

Corresponding Current Provision(s): *See* 11 Del. C. §§ 461, 463

Comment:

Generally. This provision explains the implications of the existence of a defense for a person's possible criminal liability. Section 300 states a principle implicit in the notion of a "defense": it applies even if one has done something that would otherwise constitute an offense.

Relation to current Delaware law. Section 300's rule reflects current law, under which defenses similarly preclude conviction even if all offense elements are satisfied. This principle is contained in 11 Del. C. § 461, which broadly states that "justification . . . is a defense," but § 461 does not specify the practical effect of general defenses, and how they differ conceptually from affirmative defenses, for example. Other defenses may operate by negating the defendant's culpability, so that a successful defense means the defendant does not satisfy all elements of the offense. General defenses, however, operate despite the defendant satisfying all elements of an offense. That is why 11 Del. C. § 463 (Justification – Choice of evils) is phrased in the following terms: "conduct *which would otherwise constitute an offense* is justifiable when . . . ." But Choice of evils is not the only general defense that functions this way; indeed, all justification, excuse, and nonexculpatory defenses work the same way. For that reason, Section 300 includes them all, from Chapters 300, 400, and 500.

General Comment Regarding Justifications:

Justifications differ from excuses in that they relate to specific *conduct*, not specific *persons* (although sometimes, only particular persons are authorized to perform the justified conduct). In other words, an *act* is (or is not) justified, whereas an *actor* is (or is not) excused. Justifications exist independently of an actor's state of mind: in common-law legal terms, a justification negates the existence of an *actus reus*, not the existence of a *mens rea*.

This distinction is important because a defense's status as a justification, an excuse, or a nonexculpatory defense has important legal implications. For example, a person acting in self-defense may be assisted by others, and may not lawfully be interfered with. On the other hand, an aggressor is entitled to resist a person who *mistakenly* believes herself to be acting in self-defense; that person, even if excused, is not justified. Moreover, because justifications recognize conduct that is socially acceptable, and often desirable, it is sensible to require the prosecution to prove that conduct was not justified. Excuses and nonexculpatory defenses, by contrast, operate to prevent liability for harmful conduct that would ordinarily constitute an offense. Accordingly, and because the state-of-mind or other evidence relevant to an excuse or nonexculpatory defense is frequently within the control of the defendant, it is sensible to shift the burden of persuasion to the defendant for those defenses. *See* proposed Sections 301, 401, and 501, and corresponding Commentary.

Proposed Chapter 300 maintains the language of justification in current Delaware law, which already reflects this understanding of justification defenses. For example, 11 Del. C. § 462 (Justification – Public Duty) states that "conduct . . . is justifiable when . . . ." and § 467 (Justification – Use of force in law enforcement), describing conduct, states that "[t]he use of force . . . is justifiable when . . . ." This language reflects the distinction between justified conduct and excused persons—a distinction of considerable practical importance.

Note that Delaware's 1972 Criminal Code, mirroring the Model Penal Code on which it is based, does not use the terminology of "excuses" and "nonexculpatory defenses." In 1971, the National Commission on Reform of Federal Criminal Laws released its Final Report, which pioneered the use of those terms. This was widely considered an improvement upon the Model Penal Code because of the firm conceptual distinction it drew between justifications and other general defenses. Beginning in 1971, this new terminology became ubiquitous in new criminal codes throughout the United States and criminal law scholarship. Given that the project that generated the current criminal code began before 1971, it is understandable that it did not draw upon the National Commission's innovations. Today, however, these distinctions are so generally accepted that the terms "excuse" and "nonexculpatory" must be used in the Proposed Code.

Comment on Section 301. General Provisions Governing Justification Defenses

Corresponding Current Provision(s): 11 Del. C. §§ 463, 470(b); *see also* §§ 464(d)-(e)(1), 465(a), 467(a)(1)

Comment:

Generally. This provision sets out several general rules applying to justification defenses. Section 301(a) creates a rule mandating the supremacy of more specific justifications over more general ones. This is because the more specific justifications set out in full the legislative determinations that have been made regarding liability for specific forms of conduct. To allow a more general provision to supersede or complement the more specific one would enable circumvention of the particular determinations the General Assembly has made regarding that conduct. At the same time, Section 301(b) makes clear that conduct may relate to several justification rules at once—for example, an aggressor's conduct may threaten both a person's life and her property. Where this is the case, the actor may act according to the allowances of any

relevant justification. In the above example, if the self-defense provision authorizes deadly force, the person may employ that level of force even though the defense of property provision, standing alone, would not allow it. Section 301(c) notes that justified conduct, beyond merely being non-criminal, merits heightened legal status: one person may lawfully assist, and may not lawfully seek to impede, another's justified conduct. Section 301(d) covers situations where an actor causes the circumstances that give rise to the justification for her conduct. Section 301(e) specifies that justified conduct could still give rise to criminal liability where the conduct causes injury, or creates a risk of injury, to innocent persons unconnected to the circumstances that make the conduct justified. Section 301(f) places the burden of disproving justifications upon the State beyond reasonable doubt.

Relation to current Delaware law. Section 301(a) corresponds, in part, to 11 Del. C. § 463, which only supplies a choice of evils defense as long as it is not "inconsistent with the ensuing sections of this Criminal Code defining justifiable use of physical force." Subsection (a) states the same basic principle of statutory construction that "the specific controls the general." *See, e.g., State v. Cook*, 600 A.2d 352, 355 (Del. 1991). Yet, it recognizes that lesser evil, or choice of evils, is not the only justification defense that should conceivably be supplanted by more specific justifications. Section 301(a) denies any justification where the General Assembly has made a more nuanced decision that specific types of conduct are or are not justified, regardless of whether they satisfy the requirements of the more generalized "lesser evil" and public-duty justifications. For example, proposed Section 307(d), which governs the defense of property, and proposed Section 306(c)(1), which governs the use of deadly force, together provide that using deadly force to protect only property is never justified. Section 301(a) makes clear that—regardless of other interests involved—the lesser-evil justification can never be used to circumvent a more specific rule such as the one preventing the use of deadly force to protect only property. Section 301(a) would, however, allow a defendant to raise both the lesser-evil justification and an asserted *excuse* defense. Likewise, Section 303 is drawn in such broad terms that the rationale for limiting the applicability of the lesser-evil justification applies to it as well.

Section 301(b), which provides that multiple justification defenses are available in situations not governed by Section 301(a), is in keeping with Delaware's current treatment of specific justification defenses as components of one general defense of justification. *See Alexander v. Cahill*, 829 A.2d 117, 128 (Del. 2003) ("The Justification defense in Delaware is a general defense that includes the specific defenses of Execution of a Public Duty (11 Del. C. § 462), Choice of Evils (11 Del. C. § 463), and Self Defense (11 Del. C. § 464)").

Section 301(c)'s rule that one may not interfere with justified conduct is consistent with current Delaware law. For example, under 11 Del. C. § 464(d), a person may not resist the justified use of force in effecting a lawful arrest. The rule that justified conduct may be assisted finds support in current law as well. For example, under 11 Del. C. § 467(a)(1), a civilian may assist a police officer to make an arrest, and under 11 Del. C. § 465(a), a person is justified in defending a third person against an aggressor to the same degree that the victim could defend herself.

Section 301(d) has no directly corresponding provision in current Title 11, but two current provisions discuss the availability of justifications where the defendant herself has caused the justifying conditions. *See* 11 Del. C. §§ 463 ("choice of evils" defense only available in "a situation occasioned or developed through no fault of the defendant"); 464(e)(1) (deadly force not justified if "[t]he defendant, with the purpose of causing death or serious physical injury, provoked the use of force against the defendant in the same encounter"). Section 301(d) follows

the same general rule as those provisions: where the defendant was not culpable in causing the justifying circumstances, her conduct is justified; but where she was culpable, her conduct is not justified.

Section 301(d) differs from the current rules governing causing the conditions of one's own justification, however, in three ways. First, the proposed provision sets forth rules applying to justification defenses generally, whereas the current provisions apply only to the self-defense and necessity justifications. This broader scope enables consistent treatment of similar issues. For example, 11 Del. C. § 464(e)(1) only denies a justification for use of *deadly force* when the defendant provokes the aggressor's use of force against the defendant. This provocation provision is drawn narrowly, failing to deny a defense in other, very similar situations. Most obviously, it does not deny a defense where the defendant intentionally provokes her attacker as an excuse to inflict harm, but only uses non-deadly force. 11 Del. C. § 464(e)(1) also clearly denies the defense-of-person justification where the defendant provokes the use of force against *another person*—for example, by accusing that person of a misdeed against the provoked individual—as an expedient for justifying her own use of force.

Second, Section 301(d) provides that the availability of a justification defense uniformly depends on whether the defendant caused the justifying conditions with the culpability required by the charged offense. The current provisions, by contrast, prescribe standards that are less consistent. While 11 Del. C. § 464(e)(1) narrowly precludes the self-defense justification only where the defendant "provokes" the victim with the "intent" to cause the justifying conditions, 11 Del. C. § 463 more broadly bars the choice of evils defense whenever the defendant is at "fault" for causing the situation. Section 301(d)(2)'s formulation provides that the culpability required as to causing the justifying conditions should be the same as the culpability requirement(s) of the charged offense.

Third, Section 301(d)(3) introduces a new rule recognizing the availability of general defenses in cases where the defendant causes the conditions of the person's own justification defense. Just as a person may have a justification, excuse, or nonexculpatory defense as to the offense itself, it is appropriate to allow such a defense as to a defendant's conduct in causing the conditions of a justification. For example, Section 301(d)(3) would allow a duress defense in a case where one is coerced at gunpoint to cause the conditions of a lesser-evil justification.

Section 301(e) preserves 11 Del. C. § 470(b) in specifying that justified conduct may still give rise to criminal liability if it creates a risk to or injures innocent parties. Subsection (e) differs from § 470(b) by removing the culpability requirement that the defendant "recklessly or negligently injures or creates a risk of injury to innocent persons." But this does not change the practical effect of the provision, because lesser culpability requirements are satisfied by proof of greater culpability requirements. By specifying "recklessly or negligently," the current formulation could be misinterpreted to exclude knowing injury of innocent persons, which is unlikely to have been intended by the General Assembly. Note also that Section 301(e) does not destroy the defendant's justification, but merely clarifies that the justification does not extend to any collateral effects of the defendant's conduct towards persons other than the aggressor.

Section 301(f) places the burden of persuasion upon the State to disprove all justification defenses beyond reasonable doubt. *See* proposed Section 106(b)(1)(B) and corresponding Commentary. Note, however, that the defendant still bears the burden of production on justification defenses. *See* proposed Section 106(b)(2) and corresponding Commentary.

Comment on Section 302. Choice of Evils

Corresponding Current Provision(s): 11 Del. C. § 463; *see also* §§ 464(a), 466(a), 467(a)(1)

Comment:

Generally. This provision ensures that conduct will not give rise to criminal liability where the conduct is objectively necessary to avoid a threatened harm even greater than that caused by the conduct itself. For example, an ambulance may exceed the speed limit or pass through a traffic light, or property may be destroyed to prevent the spread of a fire.

Relation to current Delaware law. Section 302, in most ways, is functionally similar to 11 Del. C. § 463. They differ in three material ways. First, Section 302(a) provides that the conduct must be "*immediately necessary* to avoid a harm or wrong," whereas § 463 requires that the conduct be "necessary as an emergency measure to avoid an *imminent* public or private injury." This shifts the requirement of immediacy from the threat to the need to respond to the threat. Some threats, although foreseeable, may not become "imminent" for some time—at which point it may be too late to respond and prevent the treat. For example, the crew on a ship that is leaking or has low rations, but whose captain refuses to return to port, may not face the imminent threat of capsizing or starvation for some time, at which point the ship may be too far out to return to shore. At the same time, forbidding the crew to mutiny until such action becomes immediately necessary—until they have reached the "point of no return"—gives the captain time to relent. This concept of "immediate necessity," moreover, is more consistent with other justifications in current law. See 11 Del. C. § 464(a) ("use of force . . . is justifiable when . . . such force is *immediately necessary*") (emphasis added); § 466(a) (same); § 467(a)(1) (same).

Second, Section 302(b) provides a simple requirement that "the harm or wrong to be avoided by the defendant's conduct is greater than that sought to be prevented by the law defining the offense charged." In contrast, 11 Del. C. § 463 provides a lengthy standard: the injury to be avoided must be "of such gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding such injury clearly outweigh the desirability of avoiding the injury sought to be prevented by the statute defining the offense in issue." It is difficult to discern what exactly are the "ordinary standards of intelligence and morality," so this requirement has been distilled into its basic function, which is to weigh the seriousness of the relative harms.

Finally, Section 302(c) corresponds to the final sentence of 11 Del. C. § 463, but states a broader principle of exception, more simply. Subsection (c) provides that any legislative purpose to exclude the claimed justification under Subsections (a)-(b) makes the justification unavailable. This clearly encompasses § 463's exception, which is that the existence of a law cannot itself be claimed as the "greater evil" to be avoided. The fact that the General Assembly passes a law is evidence of legislative purpose that this kind of claimed justification not be available. Yet, Subsection (c) also denies the general lesser-evil justification in other situations where the General Assembly has already made a more particular determination regarding the interests involved. For example, Section 302(c) would deny the lesser-evil defense where an inmate has escaped from a correctional institution to avoid poor prison conditions. The General Assembly's decision to criminalize escape reflects a determination that the harms of that offense—public fear and institutional disorder—outweigh the harms associated with poor prison conditions. The proposed, broader limitation ensures that such a legislative determination is not defeated by the defendant's own balancing of the interests involved.

Section 302 omits 11 Del. C. 463's requirement that the injury to be avoided come about through "a situation occasioned or developed through no fault of the defendant," which is instead addressed by proposed Section 301(d).

Comment on Section 303. Execution of Public Duty

Corresponding Current Provision(s): 11 Del. C. § 462; *see also* 7 Del. C. § 724(e); 11 Del. C. §§ 271, 542, 770(b), 771(b), 1409; 24 Del. C. § 4604(b)

Comment:

Generally. This provision provides a justification for conduct explicitly allowed by a governmental institution with the lawful power to authorize the conduct. Section 303 incorporates, rather than reiterates, the law governing public duties. Section 303(a)(1) justifies conduct authorized by laws defining the powers and duties of public servants. Section 303(a)(2) provides a defense for conduct authorized by laws governing the execution of legal process. Section 303(a)(3) immunizes conduct sanctioned by a court or tribunal. Section 303(a)(4) is a catch-all provision justifying conduct authorized by other laws imposing public duties. Section 303(b) provides that the justification is available even if there is a defect in legal process, or the court lacks jurisdiction.

Relation to current Delaware law. Section 303(a)(1)-(3) are substantially similar to 11 Del. C. § 462(a)(1)-(3), (5). Section 303(a)(4), the "catch-all" provision, is new, and is broad enough to cover § 462(a)(4), which relates to laws governing the military services and the conduct of war, because that subsection will likely apply so infrequently domestically that it need not be specifically provided for. Section 303(b) corresponds to 11 Del. C. § 462(b)(1), but adds the requirement that the defect be "unknown to the defendant" to prevent defendants from taking advantage of the mistakes of others. The issue of a civilian's belief when assisting an officer in § 462(b)(2) is not incorporated, because this requirement is addressed by proposed Section 409's excuse defense for mistakes as to justifications.

Note that Section 303 renders unnecessary numerous exemptions, exceptions, and affirmative defenses for conduct authorized by laws imposing public duties. *See, e.g.,*, 7 Del. C. § 724(e); 11 Del. C. §§ 271, 542, 770(b), 771(b), 1409; 24 Del. C. § 4604(b).

Comment on Section 304. Law Enforcement Authority

Corresponding Current Provision(s): 11 Del. C. § 467; *see also* § 466

Comment:

Generally. This provision provides a justification for conduct—specifically, use of force—necessary to bring a person into lawful custody, or prevent a person's escape from custody.

Relation to current Delaware law. Section 304(a) provides a justification for the conduct of a peace officer, or one assisting a peace officer, in making a lawful arrest or detention. Section 304(a)(1) is substantially similar to 11 Del. C. 467(a)(1), but makes two modifications. First, Section 304(a)(1) applies to any "conduct" necessary to effect a lawful arrest *or* "lawful . . .

detention," whereas current law much more narrowly justifies only the "use of force . . . necessary to effect [an] arrest." The proposed provision's broader language makes clear that the justification applies to conduct other than force—so that a peace officer is also justified in, for example, trespassing or speeding to effect an arrest—and that the justification applies to non-arrest detentions, such as *Terry* stops. Second, Section 304(a)(1) omits § 467(a)(1)'s requirement that the defendant "believes" the arrest is necessary. This has been done in recognition of the applicability of proposed Section 409's excuse defense for mistakes as to justifications.

Section 304(a)(2) directly corresponds to 11 Del. C. § 467(b)(1) in requiring that the arrestee or detainee must have been made aware of the purpose of the arrest or detention, if it is reasonable to do so, before use of force is justified. Note that this only applies to use of force, not all conduct that could potentially be justified under Subsection (a)(1).

Section 304(a)(3) corresponds to 11 Del. C. § 467(c) in setting forth the conditions for deadly force to be authorized under Section 304. Subsection (a)(3)(A) provides that "the force is necessary to prevent the arrest from being defeated by resistance or escape," replacing the current requirement that "all other reasonable means of apprehension have been exhausted." In a sense, the proposed language achieves the same result: if other reasonable measures have not yet been tried, then use of deadly force is not necessary. If no reasonable measures are left, then deadly force *is* necessary. The concept of "necessity" is fundamental to the language of justifications in current Delaware law, and, to the extent possible, it is desirable to use consistent terminology to express these fundamentals.

Section 304(a)(3)(B) directly corresponds to 11 Del. C. § 467(c)(2). Section 304(a)(3)(C) is a simplified version of § 467(c)(1), which requires that the arrestee have committed or attempted a violent felony to justify use of deadly force. The requirement that the defendant "believes" that condition to be true has not been retained, in recognition of the applicability of proposed Section 409's excuse defense for mistakes as to justifications. Section 304(a)(3)(D) directly corresponds to 11 Del. C. § 467(c)(3). Consistent with other instances in § 467 and other current justification provisions, the requirement of the defendant's belief has not been incorporated, due to proposed Section 409's excuse defense for mistakes as to justifications.

Section 304(a)(4) corresponds to 11 Del. C. § 467(b)(2), but reframes the requirement that an officer believe a warrant to be valid. Under Section 304(a)(1), a valid warrant would make an arrest lawful regardless of the peace officer's belief about the warrant's validity. The issue of the officer's belief would come into play only if the warrant is actually invalid, in which case proposed Section 409's excuse defense for mistakes as to justifications would come into play. Subsection (a)(4) frames the issue by stipulating that proof that the officer knew a warrant to be invalid destroys the officer's justification, rather than requiring the officer's belief in the warrant's validity to establish her justification.

Section 304(b) directly corresponds to 11 Del. C. § 467(d), with two minor changes. First, Subsection (b)(1) specifies a necessity requirement that exists in current law, but only appears by reading together the current statute's requirements that the "force could justifiably have been employed to effect the arrest," and that use of force to effect an arrest is only justified if it is "immediately necessary" under § 467(a)(1). Second, Subsection (b)(2) more specifically lays out what is meant by a person "charge with or convicted of" a crime. Functionally, however, the provision is identical to current law.

Hostage Provisions. Section 304 does not retain 11 Del. C. § 467(a)(2) or (f), which deal with arrests in hostage situations. To the extent these provisions are concerned with justifying a peace officer that makes an arrest, they are not necessary because the authorization in Section

304(a)(1) already supplies that justification. To the extent the hostage provisions are concerned with justifying use of force to protect the lives of the hostages, the provisions are redundant with the justification for defense of persons—including third persons, such as hostages—in Section 306. Furthermore, portions of § 467(f) only relate to the potentially mistaken belief of the defendant in the risks created by the hostage-taker. Those provisions need not be incorporated because of the applicability of proposed Section 409's excuse defense for mistakes as to justifications.

Preventing Suicide. Section 304 does not retain the portion of 11 Del. C. § 467(e) dealing with use of force to prevent another person from self-inflicting serious physical injury or committing suicide. This justification does not appear to apply solely to peace officers, but to any person. For that reason, this provision is better handled in Section 306 (defense of person).

Preventing Breaches of the Peace, Riots, and Mutinies. The remaining portions of 11 Del. C. § 467(e) are not retained because they are redundant with other justification provisions that already exist. Where rioters are threatening property, or are otherwise violating the law, use of force by law enforcement is already justified under either Section 303 (execution of public duty), Section 307 (defense of property), or Section 306 (defense of persons). If rioters are threatening or attempting to commit a crime, then they have already committed the inchoate offense of attempt and may be lawfully arrested. No additional justification is necessary for law enforcement. Yet, where rioters' or mutineers' behavior rises to the level of danger that deadly force would be an appropriate response, it would already be justified under Section 306 (defense of person). If property protection were the only issue with which § 467(e)(1)-(2) were concerned, the use of deadly force could not be justified. That would directly contradict the policy established more clearly in 11 Del. C. § 466, which does not authorize use of deadly force in any circumstance where only property is endangered.

Comment on Section 305. Conduct of Persons with Special Responsibility for Care, Discipline, or Safety of Others

Corresponding Current Provision(s): 11 Del. C. § 468

Comment:

Generally. This Section provides a justification for use of force by those charged with a special responsibility for others. This conduct—including parents' or teachers' authority to protect or discipline children; wardens' authority to impose order on a prison population; and medical professionals' need to administer care or restrain those posing a danger to others or themselves—might not otherwise fall within the scope of the justifications set out in this Chapter. Each part of the provision specifies the categories of person to whom it applies and the range of conduct allowed. For example, Section 305(a) applies to any of the persons specified in Subsections (a)(1)(A)(i)-(iii), but imposes in Subsection (a)(1)(B) a general limitation on the acceptable use of force by those persons.

Relation to current Delaware law. Section 305(a) makes a general introductory statement of justification in particular circumstances for groups of persons that are enumerated in its Subsections. Those circumstances and groups are functionally identical to 11 Del. C. § 468. Note, however, that Subsection (a) does not incorporate any language from § 468 requiring that force used be "reasonable and moderate," nor does it retain any of the language explaining what

should be taken into account by the court to determine whether force is "reasonable and moderate." Instead, each justification in Section 305(a) is written to require that the force used be "necessary" to further some specific purpose. Current law already does this, but does not highlight the practical effects of this structure. If the parent, teacher, guardian, doctor, or other person is acting in furtherance of a proper purpose under the law, and the force used is *necessary* to further that purpose, then the force used will already be "reasonable and moderate." The reasonableness of force depends on it serving a proper purpose; the moderation of force depends upon the defendant using no more force than is necessary to achieve the lawful purpose. It would be redundant to use both standards. The concept of necessity was preserved instead of "reasonableness" and "moderation" because necessity is constantly reiterated in the language of justification defenses, promoting consistency with the rest of Chapter 300. The factors currently used to determine whether force is "reasonable and moderate" can and should be used to weigh whether force is necessary. But those factors need not be specified, because necessity is a "totality of the circumstances," case-by-case determination.

Note also that requirements of "belief" in the necessity of the force used throughout 11 Del. C. § 468 are not retained, because proposed Section 409's mistake as to justification provision deals with every instance of a defendant's belief.

Section 305(a)(1) provides a justification defense for persons responsible for the care and supervision of children, and persons in the custody of other persons or institutions. Section 305(a)(1)(A)(i) directly corresponds to 11 Del. C. 468(1). An explicit necessity requirement has been added to Section 305(a)(1)(A)(i) in recognition of the fact that current law's "reasonable and moderate" requirement is, in effect, a necessity requirement. Otherwise, the current and proposed provisions are the same. The persons in this Subsection have two abilities that other classes of persons in Section 305 do not. First, Section 305(a)(1)(A)(i)(bb) clarifies that only parents and guardians are given concurrent justification to use force for the other specific purposes justified for other classes. For example, if a bus driver could use force upon a child who is being disorderly to maintain order on a bus, the child's parent could also use force to maintain order for others—even though the use of force is not (strictly speaking) safeguarding the welfare of the child under Section 305(a)(1)(A)(i)(aa). Second, Section 305(a)(1)(A)(i) provides that only parents and guardians may delegate their use of force to others who then benefit from their justification defense.

Section 305(a)(1)(A)(ii) directly corresponds to 11 Del. C. § 468(3), providing a justification for persons in charge of the general welfare of persons in their custody, including persons in institutional custody. The phrase, "a person entrusted by authority of law to the custody of another person or to an institution" has been substituted for § 468(3)'s outdated term "incompetent person," which requires a definition even if it were to be retained.

Section 305(a)(1)(B) provides a general limitation on the use of force for the classes of persons in Subsection (a)(1)(A), based upon 11 Del. C. § 468(1)c. and (3)c. Subsection (a)(1)(B) is a shortened summary of the language in § 468(1)c. The list of unjustified acts contains a catch-all provision that all the specific acts fall into, so only the catch-all language is preserved in Subsection (a)(1)(B). Additionally, disfigurement and death are included in the definition of serious physical injury, which is itself included in the definition of physical injury, so that language has not been included.

Section 305(a)(2) directly corresponds to 11 Del. C. § 468(2), providing a justification for teachers and other persons similarly entrusted with the care of children for specific purposes. This authorization differs from the justification for parents and guardians in Subsection

(a)(1)(A)(i) in one important way not already mentioned. Although the use of force by these persons must be "consistent with the person's welfare," a general appeal to the person's welfare is not enough to justify use of force. Rather, the force must serve the special purpose for which the person has been entrusted with the child's care. Subsection (a)(2)(C) preserves the same general limitation from current law that is used in Subsection (a)(1)(B), which is based upon § 468(2)b.

Section 305(a)(3)'s justification defense applies to medical treatment by doctors and therapists or persons acting at the direction of doctors or therapists. This provision directly corresponds to 11 Del. C. § 468(4). Language regarding the defendant's belief has been removed from Subsection (a)(2)(B)(ii) because of the applicability of the excuse defense for mistakes as to justifications, provided in Section 409.

Section 305(a)(4) immunizes the use of force by a correctional officer to enforce the rules or procedures of a correctional institution. Subsection (a)(3) is substantially similar to 11 Del. C. § 468(5)-(5)a. Current § 468(5)b. has not been included in Subsection (a)(3) because if "[t]he nature or degree of force used" is "forbidden by any statute governing the administration of the institution," then that force cannot be necessary to enforce the rules or procedures of the institution. Additionally, language regarding the defendant's belief has been removed from Subsection (a)(3) because of the applicability of the excuse defense for mistakes as to justifications, provided in Section 409.

Section 305(a)(5) provides a justification defense for persons who are responsible for the safety of common carriers, and directly corresponds to 11 Del. C. § 468(6)-(6)a. "[V]essel or aircraft" in § 468(6)a. fails to account for other forms of travel that could be protected by responsible persons, so Subsection (a)(4) additionally includes trains, vehicles, and other carriers. This makes the types of common carriers in both Subsections (a)(4) and (a)(5) identical, improving consistency in Section 305.

Section 305(a)(6) provides a justification defense for persons who are authorized or required by law to maintain order or decorum on a common carrier. Subsection (a)(5) directly corresponds to 11 Del. C. § 468(7), but without any language regarding the defendant's belief because of the applicability of the excuse defense for mistakes as to justifications, provided in Section 409.

Section 305(b) provides a general limitation on the use of deadly force in any of situations described in Subsection (a). This limitation is based upon 11 Del. C. § 468(5)c. and (6)b., as well as the general requirement that any force used be "reasonable and moderate;" or—as Chapter 300 is worded—*necessary* for the purposes listed in Section 305. On their face, deadly force should not be necessary for any of those purposes unless they involve protecting a person from death or serious physical injury. In that case, use of deadly force is independently justified under Section 306.

Comment on Section 306. Defense of Person

Corresponding Current Provision(s): 11 Del. C. §§ 464, 465, 467(e); *see also* 469

Comment:

Generally. This provision entitles a person to use force to protect herself or another person from physical harm. Subsection (a) sets the general authorization for use of force.

Subsection (b) sets a limitation upon use of force in defense of another person, and sets an exception for use of force to resist arrest, including unlawful arrests. Subsection (c) sets forth the more limited circumstances in which deadly force may be justified, which are the only circumstances justifying deadly force in Chapter 300 aside from the law enforcement authority justification in Section 304. Subsection (c) includes Delaware's rules as to when a person must retreat instead of using deadly force. Subsection (d) provides a justification for use of force to prevent another person from committing suicide or self-inflicting serious physical injury.

Relation to current Delaware law. Sections 306(a)-(c) combine the very similar elements of 11 Del. C. §§ 464-65 (Justification–Use of force in self-protection; Justification–Use of force for the protection of other persons). Note that, throughout Section 306, language regarding the defendant's belief in current law has not been included, due to the applicability of the excuse defense for mistakes as to justifications, provided in Section 409.

Section 306(a) directly corresponds to the general authorizations for use of force in 11 Del. C. §§ 464(a) and 465(a)(3). Just like in current law, Subsection (a) requires that use of force be *immediately necessary* to protect oneself or another person. The temporal focus of this requirement is not on the imminence of the threat, but is instead upon the last moment in time in which use of force can still effectively counter the aggressor's attack.

Section 306(b)(1) directly corresponds to 11 Del. C. § 465(a)(1)-(2). Subsection (b)(1) provides that a person can only justifiably act in defense of another person if two hypothetical conditions are satisfied: the defendant would have to be justified in using the force under Subsection (a) if she were the subject of the aggressor's attack instead of the other person; and the other person would have to be justified in using the same level of force against the aggressor. This ensures that the defendant does not use more force than is actually necessary to repel the attack, and makes the defendant responsible for using any special skills or abilities she has that the other person does not. For example, if the defendant is skilled in a martial art that would allow her to easily disable the attacker without using deadly force, she is not justified in using deadly force, even if the person she is defending would be justified in using deadly force on her own behalf.

Section 306(b)(2) directly corresponds to 11 Del. C. § 464(d), which creates an exception for use of force to resist arrests, even unlawful arrests. The phrase "or assist another in resisting" has been added for comprehensiveness and clarifies that a person cannot come to the aid of another person who is being arrested. This clarification is important because Section 306 combines the justifications for self-defense and defense of another, which appear in different sections of current law.

Section 306(c)(1) directly corresponds to 11 Del. C. § 464(c), which provides that deadly force is only justified to protect against death, serious physical injury, kidnapping, or sexual intercourse compelled by force or threat of force. Note that these are the exclusive situations that justify use of deadly force outside of a law enforcement authority justification under Section 304. The phrase "sexual intercourse compelled by force or threat" is retained, rather than replacing it with the simpler term "rape," because rape is defined in Section 1301 to include nominally consensual sex that involves a young participant (though that "consent" is legally ineffective). It would be beyond the scope of the General Assembly's intent to allow a young person to "consent" to sex with an older person, then kill the older person to prevent consummation of the act. The presence of force or threat of force would still be required before deadly force could be used.

Section 306(c)(2) sets forth the circumstances in which retreat is required instead of using deadly force. Note that because retreat is never required before use of non-deadly force may be justified, 11 Del. C. § 464(b) is not necessary. Subsection (c)(2)(A) corresponds to 11 Del. C. §§ 464(e)(2) and 465(b). The exceptions to the retreat rule in Subsection (c)(2)(B) correspond to 11 Del. C. §§ 464(e)(2)a.-c. and 465(c). Subsection (c)(2)(B)(iii) refers to the specific justification for law enforcement authority in Section 304, rather than describing that justification as in § 464(e)(2)c., to promote consistency within Chapter 300. Note that this automatically includes both peace officers and persons directed to assist them.

Section 306(d) corresponds to the part of 11 Del. C. § 467(e) that provides a justification for use of force to prevent suicide and self-infliction of serious physical injury. Although that justification appears in the current section dealing with law enforcement authority, the justification does not appear to apply solely to peace officers. Because preventing suicide or self-harm is a form of defense of person, it has been put in Section 306 instead.

Person Unlawfully in Dwelling. Section 306 does not specifically incorporate 11 Del. C. § 469. To the extent § 469 describes the necessity of using force to repel a home invader, it is redundant with the justifications already provided by Section 306. Yet, § 469 also describes some particular situations that speak to the reasonability of a person's mistaken belief in the necessity of using force to repel a home invader. Those situations are comprehensively covered by the excuse defense for mistakes as to justifications, provided in Section 409. The factual situations described in § 469 can easily be factored into a determination of whether a person's mistaken belief is excused.

Provocation with Intent to Inflict Injury. 11 Del. C. § 464(e)(1) is not specifically incorporated into Section 306. The general provision in Section 301(d) denies a justification to a person who causes the conditions that give rise to the need for justified conduct if they are caused with the culpability required by the offense. Current § 464(e)(1) describes a specific instance of this general rule. Furthermore, § 464(e)(1) requires a culpability of "intent." If the provoking defendant intends to harm the aggressor, then the culpability required by the offense will always be satisfied under Section 301(d).

Comment on Section 307. Defense of Property

Corresponding Current Provision(s): 11 Del. C. §§ 466, 840(c)-(d), 858(d)-(e), 1474

Comment:

Generally. This provision entitles the owner of property, or someone with a special relation to the owner, to use force to protect property from invasion, destruction, or theft.

Relation to current Delaware law. Section 307 is substantially similar to 11 Del. C. § 466, but includes a related, but more specific, justification for merchants based upon the "shopkeeper's privilege" provisions in 11 Del. C. §§ 840 and 858. Note that, as for other justifications, all language regarding the defendant's belief has been removed, due to the applicability of the excuse defense for mistakes as to justifications, provided in Section 409.

Section 307(a) directly corresponds to the elements of the justification in 11 Del. C. § 466(a)-(b). Note that Subsection (a), following current law, only authorizes use of force to *prevent* the aggressor's interference with property. The justification does not allow a defendant to resort to self-help to retake or reenter her property. *See Yocum v. State,* 777 A.2d 782, 784

(Del. 2001) ("[T]he use of force in the protection of property does not extend to efforts to retrieve the property after the theft is accomplished. . . . To hold otherwise would sanction a form of vigilantism . . . .").

Section 307(b) directly corresponds to the provision in 11 Del. C. § 466(b)(1)-(3) that the defendant, in certain circumstances, need not request that the aggressor desist before using force in protection of the property.

Section 307(c) provides a justification for merchants or operators of lawful gambling facilities, based on the notion of a "shopkeeper's privilege," who detain shoplifters or cheaters for the purpose of summoning law enforcement. Subsection (c) is based upon 11 Del. C. §§ 840(c) and 1474, but has reworded the current provision in the language of Section 308(c)'s justification defense for use of force, the definition of which includes "confinement" or "restraint." Because of this reframing, § 840(c)'s language regarding "probable cause" and "reasonable belief" is instead handled by the proposed excuse defense for mistakes as to justifications in Section 409. Note that the limitation on civil liability in Section 307(e) is broad enough to cover § 840(d), and that both Subsection (e) and the breadth of the meaning of "theft" in Chapter 2100 should also cover the "shopkeeper's privilege" provisions in 11 Del. C. § 858(d)-(e).

Section 307(d) is based upon 11 Del. C. § 466(c), which provides for use of deadly force in special circumstances of property protection, but gets to the same result through a different avenue. Subsection (d) attempts to embody the principle underlying § 466(c), which is that defense of *property*, by itself, is not a sufficient basis to take another person's life. Current § 466(c) describes situations where a person could reasonably believe that deadly force is necessary to protect *human life*, in addition to or at the same time as protecting property. But, the current provision makes this judgment inconsistently. Killing to prevent dispossession of one's home by force would be justified under Section 306 because retreat is not required before deadly force may be used in one's own home. But Section 306 still requires that the killing be necessary to prevent dispossession. That necessity requirement is missing from 11 Del. C. § 466(c), which appears to say that deadly force is automatically authorized to prevent dispossession, even if lesser force would work equally well. That principle is inconsistent with the necessity requirement that underlies every justification defense in Chapter 300. The other offenses in § 466(c) (burglary, arson, robbery, etc.) require additional threats of force and necessity. It is simpler to acknowledge—as Subsection (d) does—that Section 306's defense of person is providing the justification for use of deadly force, not Section 307. Note that, under Section 301(b), the same result would be reached by leaving Subsection (d) out of Section 307. But given the importance of the subject, it is appropriate to signal directly in the text how Sections 306 and 307 can work together.

Section 307(e) directly corresponds to 11 Del. C. § 466(d), which limits the civil liability of a person who is justified in using force in protection of property. But, Subsection (e) rewords the current provision to explicitly extend the justification to civil damages. The current formulation depends upon the *lack of a conviction* for an offense due to the force used. But there are many reasons why a person might not be convicted that have nothing to do with the person's conduct being justified. The formulation in Subsection (e) clarifies the situation to prevent an unintended civil defense to unjustified conduct.

Comment on Section 308. Definitions

Corresponding Current Provision(s): 11 Del. C. §§ 461, 471; 23 Del. C. § 2301(f)

Comment:

Generally. This provision defines certain important terms used throughout Chapter 300.

Relation to current Delaware law. Section 308(a) defines "correctional officer," which is a newly defined term that has been created to cover wardens, officers, and other similarly situated persons involved with jails, prisons, and juvenile detention. Currently, this idea is spelled out several times in the criminal code, but not simplified through use of a defined term.

Section 308(b) defines "deadly force," which directly corresponds to 11 Del. C. § 471(a), but is broken up into its elements for easier reading and application. The final sentence of § 471(a) excluding "threats" from the definition has not been included, because "threats" are not included in the ordinary definition of force or its plain meaning.

Section 308(c) defines "force," which directly corresponds to 11 Del. C. § 471(c).

Section 308(d) defines "justification defense," which is based upon 11 Del. C. § 461's statement that all the defenses together define what is a "justification."

Section 308(e) defines "unjustified" conduct, and has been created to clarify the difference between justified and unjustified conduct.

Section 308(f) defines "vessel," which directly corresponds to 23 Del. C. § 2301(f).

CHAPTER 400. EXCUSE DEFENSES

Section 401. General Provisions Governing Excuse Defenses
Section 402. Involuntary Act; Involuntary Omission
Section 403. Mental Illness
Section 404. Involuntary Intoxication
Section 405. Duress
Section 406. Ignorance Due to Unavailable Law
Section 407. Reliance Upon Official Misstatement of Law
Section 408. Reasonable Mistake of Law Unavoidable by Due Diligence
Section 409. Mistake as to a Justification
Section 410. Definitions

Comment on Section 401. General Provisions Governing Excuse Defenses

Corresponding Current Provision(s): 11 Del. C. § 431; *see also* 423

Comment:

Generally. Section 401 sets out general rules relating to all excuse defenses. These rules are distinctly relevant to excuse defenses and may be articulated only in a Code that distinguishes excuses from other defenses. *See* general Commentary preceding Commentary for proposed Section 301.

Section 411(a) makes clear that excuses are different than justifications; justified conduct may be assisted and may not be resisted,[3] while neither of these collateral rules applies where a person is excused, but not justified. This is because it is not the *act* that is excused, but the *actor*; the act is still considered improper and undesirable.

Section 401(b) states that a person's excuse remains valid even if she created the conditions giving rise to the excuse, unless she did so with the same level of culpability required by the offense. In that situation, the basis for criminal liability is not the conduct causing the offense (because that conduct is excused), but the actor's earlier conduct in causing the conditions of her excuse. For example, a young person may join a gang knowing that it frequently engages in criminal activity and, indeed, has its own "laws" requiring participation in criminal activity. Later, the person may be forced by other gang members at gunpoint to commit a crime she would otherwise not commit. Though the person might normally be eligible for a duress excuse because she was compelled to commit the crime,[4] the fact that she knew about the gang's customs and the likelihood that she would be forced into criminal activity vitiates the rationale behind the defense and supports holding the gang member liable for her offense. This person, who knew of the gang's tendencies, could be held liable for an offense requiring knowledge; a person who was reckless as to the gang's involvement in crime would, under Section 401(b), be eligible for liability only for offenses requiring recklessness.

Generally, one of three culpability rules is applied to a person's conduct creating an excusing condition: a general culpability rule of negligence, a general culpability rule of recklessness, or a culpability rule tracking the culpability requirement for the (excused) offense

[3] *See* proposed Section 301 and corresponding Commentary.

[4] *See infra* proposed Section 406 and corresponding Commentary.

ultimately committed. Section 401(b)(2) follows the third rule, as it seems appropriate to require the culpability normally required by the offense committed, rather than an alternative, possibly conflicting requirement. A contrary rule would effectively impute criminal responsibility to persons based on an actual level of culpability lower than that usually required for the offense in question. But, as Section 401(b)(3) provides, the defendant may also have a defense for that earlier conduct, notwithstanding the fact that she had the requisite culpability when she performed that conduct. For example, the gang member in the example above might have an insanity defense, or might have a defense of duress if she were forced against her will to join the gang in the first place.

Section 401(c) states that a mistaken belief in an excuse, unlike a mistaken belief in a justification, cannot be a defense to criminal liability. While justifications relate to the context and circumstances of an actor's conduct, excuses relate to whether the actor suffers from a disability or is mistaken. The actor's own erroneous belief that such a disability or mistake exists (e.g., "I thought I was insane" or "I thought I was mistaken") is not relevant to a determination of criminal liability.

Section 401(d) states that the defendant has the burden of proving an excuse defense by a preponderance of the evidence.

Relation to current Delaware law. Section 401(a)–(c) have no directly corresponding provisions in current law, other than Subsection (b)(2). 11 Del. C. § 431(b) denies a duress defense to a person who "recklessly placed himself or herself in a situation in which it was probable that the defendant would be subjected to duress," reflecting the default rule of reckless causation that is not followed in Section 401(b)(2). As discussed above, the Proposed Code would impose liability only when the defendant acted with the culpability required by the offense at the time she caused the excusing condition. Where a defendant was reckless as to causing the circumstances of duress, liability would be possible only for offenses with culpability requirements that are satisfied by recklessness, such as manslaughter.[5]

Section 401(d) embodies the same burden of persuasion currently followed in Delaware for some excuse defenses. Current law treats some excuses as affirmative defenses, which must be proved by the defendant by a preponderance of the evidence. *See Foraker v. State*, 394 A.2d 208, 214 (Del. 1978) ("11 Del. C. § 431 categorizes duress as an affirmative defense, and as such, it must be proved by the defendant by a preponderance of the evidence."); *see also* 11 Del. C. § 401(a) (categorizing mental illness or psychiatric disorder as an affirmative defense). Other excuses are not treated as affirmative defenses, such as involuntary intoxication, which is merely "a defense." *See* 11 Del. C. § 423. These imply inconsistent evidentiary rules. Excuse defenses are all the same in terms of both their underlying principles and their central evidentiary issue (the defendant's state of mind). Accordingly, they should be treated similarly with respect to the burden of proof. Because excuses apply only to conduct normally considered criminal, and because all excuses involve information and evidence uniquely in the possession of the defendant, the Proposed Code shifts the burden of persuasion to the defendant for all excuse defenses at the current level for affirmative defenses.

[5] See proposed Section 1103 and corresponding Commentary.

Comment on Section 402. Involuntary Act; Involuntary Omission

Corresponding Current Provision(s): 11 Del. C. §§ 242, 243

Comment:

Generally. Section 402 provides a defense for persons whose conduct would normally constitute an offense, but was not voluntary and could not be controlled by the actor. The involuntary act defense in Section 401(a) is applicable in cases where the defendant's conduct is not the product of her effort or determination, such as where the defendant is sleepwalking or suffers a seizure. This defense differs from the insanity defense (Section 403) in that the defendant's lack of control of her conduct at the time of the offense need not result from a mental illness or serious mental disorder. At the same time, in most cases addressed by proposed Section 403, the defendant's impairment will not be so severe as to render her conduct completely involuntary. Section 402(b) provides a similar defense in cases where liability is based on an omission.

Relation to current Delaware law. Section 402 takes the voluntariness element from current 11 Del. C. §§ 242–43—the rest of which is addressed in proposed Section 204—and creates a distinct provision treating involuntariness as an excuse, rather than describing voluntariness as a basic offense requirement. Voluntariness does not describe the harm or evil of the offense, nor is it a necessary component of the requirement of "an act" as opposed to an omission. Rather, *in*voluntariness indicates that a person is not blameworthy for her conduct, even though that conduct satisfies all requirements of an offense. In other words, involuntariness is an excusing condition; it applies when special conditions or circumstances demonstrate an actor's blamelessness for a violation of the rules of conduct. Although current Title 11 merges voluntariness with the act requirement, Delaware case law reflects a view of the voluntariness issue as a potential excuse, rather than an offense requirement. The courts have not treated voluntariness as an element of the offense, but have seen its absence as an "accident defense" rooted in the absence of criminal responsibility.[6]

Section 402(a) defines involuntary acts as acts that are "not a product of the person's effort or determination." 11 Del. C. § 243 defines a "voluntary act," and Subsection (a) is written to directly correspond to, but invert, that language.

Section 402(b) provides a defense, like 11 Del. C. § 242 does in practice, to persons who are incapable of performing a required act. The proposed provision expands the current rule to include cases where the person cannot reasonably be expected under the circumstances to perform, the omitted act. Imposing liability on such persons is inconsistent with any basis for criminal punishment; granting a defense is consistent with similar provisions regarding incapacity to control one's conduct, as set out in proposed Sections 403 and 404.

[6] *See, e.g., Wright v. State,* 953 A.2d 144, 149–50 (Del. 2008) ("[W]e . . . define accident as an unforeseen, unplanned, fortuitous, sudden and unexpected event occurring without intent or volition due to carelessness, unawareness, ignorance or a combination of these which produces an unfortunate result. . . . [E]vidence of accident . . . could negate either or both the culpable state of mind *and* the voluntariness of the act.") (citations omitted; emphasis in original).

Comment on Section 403. Mental Illness

Corresponding Current Provision(s): 11 Del. C. § 401(a); *see also* §§ 401(b), 402, 403, 404, 405, 406, 408, 409

Comment:

Generally. This provision sets out a defense excusing persons who perform conduct constituting an offense, but do so under the influence of an uncontrollable mental illness or disorder, making criminal liability inappropriate.

Relation to current Delaware law. Section 403(a)–(b) directly corresponds to 11 Del. C. § 401(a). Subsection (a)(2)(A) has no analogue in current Delaware law. Yet, it covers the presumably uncontroversial situation where the defendant literally does not know what she is doing—or does not know the situation in which she is doing it. For example, this would include a person who hallucinates that she is squeezing a lemon, and truly believes she is squeezing a lemon, but is in fact choking another person.

Subsection (a)(2)(B) substantively corresponds to § 401(a), which excuses a person who "lacks substantial capacity to appreciate the wrongfulness of his or her conduct." Note that a person who is excused under Subsection (a) is still required to be committed to an institution to undergo psychiatric treatment under current 11 Del. C. § 403. Once the committed individual is released from treatment, however—and unlike a person found to be "guilty, but mentally ill" in current law—the individual is not imprisoned afterwards.

Section 403(c) substantively corresponds the GBMI provisions in current 11 Del. C. §§ 401(b). If the GBMI provisions were not included, and its elements were combined with the excuse in Subsection (a), the insanity excuse defense would be restored to its state prior to its amendment in 1982, which created the GBMI verdict.[7] Such restoration is appealing, due to the various critiques the GBMI verdict has been subjected to over the years. The underlying basis for the GBMI verdict—that the insanity defense has been subject to abuse—is empirically unsound. Indeed, following enactment of the GBMI verdict in some states, the number of insanity acquittals actually increased.[8] In addition, allowing the verdict raises significant concerns. It is problematic for the trier of fact (often a lay jury) to make a clinical determination of whether an offender is in need of psychiatric treatment. The GBMI verdict also enables, and encourages, jurors to consider matters unrelated to guilt, when determination of guilt is their sole responsibility. Finally, a jury faced with a choice between a verdict of "not guilty by reason of insanity" and GBMI may select the latter, not because it finds the offender blameworthy, but because it believes the offender needs confinement and treatment. Such insane-but-dangerous offenders should be dealt with through civil commitment standards rather than the GBMI verdict. Nevertheless, the GBMI verdict exists in current Delaware law. Moreover, supporters of GBMI maintain that this verdict option is beneficial to the defendant. The nonpartisan consultative group supervising the drafting process for this Proposed Code has concluded that a solution providing a compromise between these approaches on the GBMI is necessary. Therefore, like

[7] *Cf.* 11 Del. C. § 401(a) (1979) ("In any prosecution for an offense, it is an affirmative defense that, at the time of the conduct charged, as a result of mental illness or mental defect, the accused lacked substantial capacity to appreciate the wrongfulness of his conduct or lacked sufficient willpower to choose whether he would do the act or refrain from doing it.").

[8] *See* Christopher Slobogin, *The Guilty But Mentally Ill Verdict: An Idea Whose Time Should Not Have Come*, 53 GEO. WASH. L. REV. 494, 507 (1985).

current 11 Del. C. §§ 401(b), Section 403(c)(1) retains the GBMI verdict option. Yet, Section 403(c)(2) specifies that this option will only be made available to the trier of fact if requested by the defendant.

Procedural Provisions Not Included. Section 403 does not include 11 Del. C. §§ 402–409, for various reasons. 11 Del. C. § 402 is redundant with D.R.E. 701–05, which relates to the testimony of expert witnesses. D.R.E. 704 already permits an expert to testify as to an ultimate issue, which is what § 402(b) describes. The remaining current provisions refer to pretrial, trial, sentencing, prisoner transfer, probation, or parole procedures related to the mental state of the defendant. These provisions are important, and must be preserved, but should be moved out of the Criminal Code, and into a subchapter of criminal procedure dedicated to mental illness.

Comment on Section 404. Involuntary Intoxication

Corresponding Current Provision(s): 11 Del. C. § 423

Comment:

Generally. Section 404 provides a defense for a person who commits an offense while under the influence of a state of intoxication that she did not voluntarily create.

Relation to current Delaware law. Section 404 is substantively similar to 11 Del. C. § 423. Section 404(a) has been broken into its constituent elements to emphasize its inherent similarity with the insanity defense in Section 403(a). For that reason, Subsection (a)(2)(A) has been added to maintain similarity between the two defenses. Section 404(b) makes clear that, as with other excuse defenses, a person may be liable for an offense if she is culpable in causing her own involuntary intoxication. *See* proposed Section 401(b) and corresponding Commentary.

Comment on Section 405. Duress

Corresponding Current Provision(s): 11 Del. C. § 431(a); *see also* 431(b)

Comment:

Generally. Section 405 defines a defense for persons who were forced to perform a criminal act under coercion that an ordinary person would not be able to resist.

Relation to current Delaware law. Section 405 is substantially similar to 11 Del. C. § 431(a), but with two changes. First, Subsection (a) uses the phrase "person of reasonable firmness" in place of the "reasonable person" in § 431(a). This is a more precise statement of what aspect of the person is being tested in a coercive situation, but maintains the principle of current law, which is to consider average ability as the standard against which a coerced person is judged. Second, Subsection (b) has been added to clarify that, although average firmness is the default requirement in all cases, the defendant must still have been unable to resist the coercion that caused her to engage in the offense conduct. In other words, a person who possesses *more* than reasonable firmness is required to resist to the limit of her ability before the duress excuse becomes available to her.

Note that Section 405 does not include 11 Del. C. § 431(b) or (c). Current § 431(b) is not included because the issue of culpable causation is covered generally, for all excuse defenses, in

proposed Section 401(b). Current § 431(c) is not included because its abolition of the antiquated duress defense for wives acting the presence of their husbands was effective. That outdated defense is not revived in the Proposed Code simply because the statement of abolition is not preserved.

Comment on Section 406. Ignorance Due to Unavailable Law

Corresponding Current Provision(s): none

Comment:

Generally. This provision upholds the *legality principle* of criminal law, which allows criminal liability only where a written statement of the law's commands exists before the alleged violation of those commands. Although ignorance of the law is generally not an excuse, fairness dictates that individuals are not punished for conduct if the government provided inadequate notice of the conduct's prohibition. The rationales for criminal liability do not apply where the defendant did not know, and could not reasonable have known, that her conduct was criminal.

Section 406(b) requires that the defendant not know that the conduct in question is criminal. This prevents exploitation of the law's unavailability by persons for whom that unavailability was irrelevant.

Relation to current Delaware law. Section 406 has no analogue in current Delaware law, but the excuse defense for a reasonable mistake of law in Section 409 based upon current case law support its inclusion in Chapter 406. *See* Section 409 and corresponding Commentary. *Long v. State*, 65 A.2d 489 (Del. 1949) established an uncodified mistake of law defense that remains available currently in Delaware. That defense, embodied in Section 409, gives an excuse defense to a person who is unable to ascertain the legality of her actions through diligent, good-faith inquiry. If a person can be excused for not knowing her conduct is criminal *after* that law has been made available, it would be irrational to withhold a defense from a person when the law prohibiting her conduct is not yet made available.

Comment on Section 407. Reliance Upon Official Misstatement of Law

Corresponding Current Provision(s): none

Comment:

Generally. Section 407, like Section 507, upholds the legality principle, but instead of applying in the case where no statement of the law is available, it applies where an existing official statement of the law is inaccurate, and a person relies on that inaccurate statement.

Relation to current Delaware law. Section 407 codifies a currently uncodified excuse defense that is available in Delaware whenever a person reasonably relies upon an official misstatement of that law. *See Kipp v. State*, 704 A.2d 839, 842 (Del. 1988) ("A mistake of law defense is appropriately recognized when the defendant demonstrates that he has been misled by information received from the state."); *Bryson v. State*, 840 A.2d 631, 634 (Del. 2003) (same). It is preferable that all general defenses be contained within the criminal Code—where attorneys, defendants, law enforcement, and laypersons can readily identify them—rather than in case law.

But, because the cases on which this defense is based do not clarify what sources of information would support it, Subsections (a)(1)–(4) have been added, based upon Model Penal Code § 2.04.

Comment on Section 408. Reasonable Mistake of Law Unavoidable by Due Diligence

Corresponding Current Provision(s): none

Comment:

Generally. Section 408 codifies a defense for persons who, even after affirmatively seeking in good faith to determine the law's requirements, make a reasonable mistake as to those requirements and unwittingly engage in prohibited conduct. The defense is allowed only if the offender exercised due diligence in an effort to determine the law's requirements, and only if the subsequent mistake is reasonable. There is little likelihood that the defense would be subject to abuse, as (under proposed Section 401(d)) the defendant has the burden of proving by a preponderance of the evidence that she exercised due diligence, that she was honestly mistaken, and that the mistake was reasonable.

Relation to current Delaware law. Section 408 codifies a currently uncodified excuse defense that is available in Delaware whenever a person makes a reasonable mistake of law, being unable to ascertain the legality of her actions, after making a diligent, good-faith inquiry. *See Long v. State*, 65 A.2d 489, 497-98 (Del. 1949) ("[I]t seems to us significantly different to disallow mistake of law where . . . together with . . . [the defendant's awareness of the existence of criminal law relating to the subject of such conduct and his erroneous conclusion (in good faith) that his particular conduct is for some reason not subject to the operation of any criminal law], it appears that before engaging in the conduct, the defendant made a bona fide, diligent effort, adopting a course and resorting to sources and means at least as appropriate as any afforded under our legal system, to ascertain and abide by the law, and where he acted in good faith reliance upon the results of such effort."). As for the mistake of law provision in Section 407, it is preferable that all general defenses be contained within the criminal Code—where attorneys, defendants, law enforcement, and laypersons can readily identify them—rather than in case law.

Comment on Section 409. Mistake as to a Justification

Corresponding Current Provision(s): 11 Del. C. §§ 441, 464(a)&(c), 465(a), 466(a)–(c), 467(a), 467(c)–(f), 468(2)a.,(5)a.,(6)a.,(7)a., 469, 470; *see also* § 441(3)

Comment:

Generally. This provision sets out a defense for a person who performs conduct that constitutes an excuse defense because of the person's mistaken impression that the conduct is legally justified in his or her situation.

Relation to current Delaware law. Section 409 embodies the approach in current Delaware law toward persons who are mistaken regarding the fact that their conduct satisfies the

elements of a justification defense in Chapter 300. Yet, Section 409 simplifies the presentation of this approach, and should make it easier to understand.

The majority of justification defenses in current law are defined purely in terms of the defendant's subjective belief. *See* 11 Del. C. §§ 464(a), 464(c); 465(a); 466(a)–(c); 467(a), 467(c)–(f); 468(2)a., (5)a., (6)a., and (7)a. Taken alone, this formulation would provide a justification for any person who believes her conduct is justified—even if the person is mistaken, no matter how culpable that mistake may be. Critically, 11 Del. C. § 470 complements the purely subjective language of the individual justification provisions by denying a justification where the culpability of the defendant's mistaken belief is equal to or greater than the culpability required for the offense. This approach to mistake as to a justification is conceptually sound, but its expression invites confusion, because it requires the reader to read multiple statutes together to determine whether or not she satisfies the excuse defense.

Instead, each justification defense in Chapter 300 is drafted in purely objective terms, and all necessary elements to determine whether a person has a valid excuse for a mistake as to a justification are collected into Section 409. This arrangement is preferable to current Delaware practice because it is consistent with the distinction between justifications and excuses. *See* General Comment Regarding Justifications following the Commentary to Section 300. Justified conduct is socially desirable, may not be lawfully resisted, and may be lawfully assisted. To make that fact clear, justification defenses should encourage only conduct that is socially desirable. A mistaken belief that a justifying circumstance exists, however, is not socially desirable. For example, it is not desirable that a person who is mistaken as to her right to act in self-defense should be assisted by others, or that the person she defends herself against should not be allowed to resist this mistaken use of force. Unfortunately, expressing a justification defense in subjective terms sends that message by announcing an irrational rule of "acceptable" conduct. Excusing a defendant's mistaken belief, rather than justifying the person's conduct, removes this confusion and maintains conceptually consistency across all the excuse defenses. Section 409 makes clear that a person who is mistaken as to her belief in justification may *not* be lawfully assisted, and her conduct *may* be lawfully resisted. *See* Section 401(a) and corresponding Commentary. Note that this formulation makes 11 Del. C. § 441(3) unnecessary, because mistakes have nothing to do with justified conduct.

Person Unlawfully in Dwelling. 11 Del. C. § 469 has not been specifically incorporated in the Proposed Code. Current § 469 provides a defense for a defendant who kills or injures a home invader under a mistaken belief as to the necessity of the force used. This specific defense provision is not necessary because proposed Section 409 provides a general defense that is broad enough to capture all cases of mistaken belief in a justification.

Comment on Section 410. Definitions

Corresponding Current Provision(s): 11 Del. C. §§ 222(18)&(25), 401(c), 422, 423

Comment:

Generally. This provision defines certain important terms used throughout Chapter 400.

Relation to current Delaware law. Section 410(a) defines an "excuse defense" as any defense defined in Chapter 400.

Section 410(b) directly corresponds to the language of the excuse defense in 11 Del. C. § 423, though current law does not specifically define "involuntary intoxication."

Section 410(c) directly corresponds to 11 Del. C. §§ 222(18)&(25) and 401(c). Subsection (c)(2) excludes intoxication altogether as a possible basis of the insanity defense because involuntary intoxication constitutes its own excuse defense in proposed Section 404. This makes 11 Del. C. § 422 unnecessary because if intoxication does not form a possible basis of an insanity defense, then evidence of intoxication is not relevant evidence, and therefore would not be admissible under the Delaware Uniform Rules of Evidence.

CHAPTER 500. NONEXCULPATORY DEFENSES

Section 501. General Provisions Governing Nonexculpatory Defenses
Section 502. Prosecution Barred if Not Commenced Within Time Limitation Period
Section 503. Entrapment
Section 504. Prior Prosecution for Same Offense as a Bar to Present Prosecution
Section 505. Prior Prosecution for Different Offense as a Bar to Present Prosecution
Section 506. Prior Prosecution by Another Jurisdiction as a Bar to Present Prosecution
Section 507. Prosecution Not Barred Where Prior Prosecution Was Before a Court Lacking Jurisdiction, or Was Fraudulently Procured by Defendant, or Resulted in Conviction Held Invalid
Section 508. Prosecutorial Grant of Immunity
Section 509. Definitions

Comment on Section 501. General Provisions Governing Nonexculpatory Defenses

Corresponding Current Provision(s): 11 Del. C. §§ 432(a), 475

Comment:

Generally. Section 501 describes the rules that govern the operation of the nonexculpatory defenses set out in Chapter 500. Sections 501(a)-(b) parallel proposed Sections 401(a) and (c). Conduct subject to a nonexculpatory defense (such as conduct by one who has been entrapped) may be resisted, whereas justified conduct (such as the use of force in self-defense) may not. A person who is mistaken as to a nonexculpatory defense—who, for example, thinks she has been entrapped by the police when she has not—is not entitled to any defense.

Section 501(c) provides a general rule that the defendant must prove all nonexculpatory defenses by a preponderance of the evidence. Some, but not all, bars to prosecution in current law specify their burdens of proof. But, if a burden-shifting rule is appropriate for some nonexculpatory defenses—under which the defendant makes no assertion of a lack of responsibility for her offense—it is appropriate for all nonexculpatory defenses. These defenses are not based on a judgment that the underlying conduct is not harmful, or that the actor is not blameworthy. Rather, they apply in situations involving conduct ordinarily subject to liability, but where some alternative social interest is deemed to override the assessment of criminal liability. Because these defenses do not exculpate the defendant, the burden should be on the defendant to prove that one of them applies.

Section 501(d) specifies that, unless expressly provided otherwise, nonexculpatory defenses are to be ruled on by the court rather than the jury. As noted above, these defenses do not involve determinations of guilt, innocence, or moral blame, and accordingly do not demand jury resolution. Resolution by the court will also be more expedient and may render unnecessary a full trial of the facts.

Relation to current Delaware law. Section 501 has no directly corresponding provision in current Title 11, which does not recognize nonexculpatory defenses as a distinct class of defenses. Yet, some Delaware law addresses the issue raised in Section 501(c). For example, under 11 Del. C. §§ 432(a) and 475, current law shifts the burden of persuasion onto the

defendant to prove entrapment and a prosecutorial grant of immunity by a preponderance of the evidence, as both are treated as affirmative defenses.

Comment on Section 502. Prosecution Barred if Not Commenced Within Time Limitation Period

Corresponding Current Provision(s): 11 Del. C. § 205

Comment:

Generally. Section 502 sets time limitations for bringing prosecutions and provides rules governing the operation of the limitations. Time limitations encourage prompt investigation of crimes and prevent stale prosecutions. This goal must be balanced against the goal of prosecuting blameworthy offenders, especially those who have committed serious crimes.

Relation to current Delaware law. Section 502 is substantially similar to 11 Del. C. § 205, except in the ways discussed below.

Section 502(a)(1) allows an indefinite period of limitation for all sexual offenses that are felonies, whereas current law in 11 Del. C. § 205(e) sets an unlimited time for prosecution of any sexual offense. Although sexual offenses are always detestable, misdemeanor offenses are, by definition, less serious than felonies. No other misdemeanors are given unlimited limitations in current law, making current law's treatment of misdemeanors internally inconsistent. Instead, Subsection (a)(3) provides a 5-year limitation period for misdemeanor sexual offenses. This recognizes the fact that victims of sexual offenses may require more time to press changes than victims of other kinds of offenses, but also treats misdemeanors, as a class of similarly serious offenses, more consistently. Note that nearly all sexual offenses are already graded as felonies, so this change does not significantly narrow the class of offenses subject to an indefinite period of time for prosecution. Note also, that the part of § 205(e) reviving causes of action "arising before, on or after July 15, 1992" is not retained. Insofar as such causes of action refer to sexual offenses that are felonies, it is unnecessary in light of the indefinite period of limitations in Subsection (a)(1). Insofar as it refers to sexual offenses that are misdemeanors, it is inconsistent with the 5-year limitation period in Subsection (a)(3).

Section 502(b)(1) corresponds to 11 Del. C. § 205(c), but simplifies the current provision by broadening its application. Under current law, a time limitation is only extended by a failure to discover the offense in situations involving intentionally concealed frauds by fiduciaries and similar parties. This is irrationally narrow: an offender should not be allowed to profit from her ability to effectively conceal her crime, regardless of what the offense is or her relationship to the victim. In any case, § 205(c)'s 3-year limitation on the extension is carried forward in Section 502(b)(1), which keeps in balance the goals of prompt investigation and preventing stale prosecutions.

Section 502(b)(3) corresponds to 11 Del. C. § 205(e), but tries to express the concerns of § 205(e) more rationally. Current § 205(e) provides an indefinite limitations period for certain offenses involving minors, including human trafficking, sexual offenses involving children, child pornography offenses, and delivering obscenity to a minor. 11 Del. C. § 205(e) is both too broad and too narrow. First, it is too narrow because the justification for extending the limitation period for child-victims applies to any offense, while the provision only applies to a certain subset of offenses involving minors. A child's immaturity may make the child unable to appreciate the

extent of the wrong that was done to the child, and therefore unable to articulate the harm to bring charges against the offender. Child-victims of any crime, not just a certain subset of crimes, should have the opportunity to bring charges as an adult. Second, § 205(e) is too broad because it makes the limitation period indefinite for offenses that otherwise would have a 5-year limitation period under Subsection (a)(2), simply because the victim is a minor. Although child-victims deserve an opportunity to bring charges as an adult, providing for an indefinite limitation period for offenses that would otherwise have a 5-year limitation period does not strike a balance between the competing goals of repose and vindication, and opens the door to many stale prosecutions based upon scant evidence. Giving a child-victim until age 20 to bring charges for any offense is a compromise that ensures those victims have ample time as adults to bring charges.

11 Del. C. § 205(e) also limits prosecutions made over extended periods with the following provision: "No prosecution under this subsection shall be based upon the memory of the victim that has been recovered through psychotherapy unless there is some evidence of the corpus delicti independent of such repressed memory." This provision has not been retained for three related reasons. First, the Proposed Code does not address specific procedural issues. Second, retaining this provision may lead to incongruous application of procedural rules on parts of the Proposed Code, and therefore undermine its clarity and efficiency. Third, while the General Assembly enacted this provision in the context of current law's statute of limitations scheme, it is unclear whether it would still deem the provision desirable in light of the Proposed Code's different treatment of the issue. Of course, if the General Assembly determines that such provision would be desirable, it could always be reinstated in the appropriate title of the Delaware Code.

Section 502(d) corresponds to 11 Del. C. § 205(j), but specifies a precise evidentiary burden on the State: that the application of a provision avoiding or extending the limitation period must be proven by a preponderance of the evidence. By making a tolling or extension provision an element of the offense that the State must allege and prove, § 205(j) appears to implicitly require that element to be proven beyond a reasonable doubt. But, that burden seems unnecessarily high, given that the application of a limitations period prevents prosecution of a defendant for reasons wholly unrelated to the defendant's guilt or blameworthiness. Additionally, Subsection (d) does not retain the requirement that the application of a tolling or extension provision be alleged as an element of an offense, because the elements of offenses are defined solely within the Special Part of the Criminal Code. Therefore, Subsection (d) makes the State's burden explicit, but defines it more rationally.

Section 502(g) is newly created, not based on current law. It is intended to clarify the operation of periods of limitation, especially regarding the effect of appeals.

Comment on Section 503. Entrapment

Corresponding Current Provision(s): 11 Del. C. § 432

Comment:

Generally. Section 503 sets out a defense covering cases where the defendant likely would not have committed the crime had law enforcement not induced the defendant to do so. This defense is meant to curb excessively coercive or manipulative police conduct. It does not,

however, suggest a lack of blameworthiness in the defendant, who has committed a crime under circumstances that would not provide a truly exculpating defense, like duress.

Relation to current Delaware law. Section 503(a) is substantively similar to 11 Del. C. § 432(a), but with the new addition of Subsection (a)(2). This limits the defense by requiring that the government's conduct have created a "substantial risk that a reasonable, law-abiding person" would also have been induced to commit the offense. Subsection (a)(2)'s language makes clear that the entrapment defense does not apply in situations where a defendant is "induced" to commit an offense by governmental conduct that is neither coercive nor manipulative. This is consistent with the explanatory language in the second part of § 432(a):

> The defense of entrapment as defined by this Criminal Code concedes the commission of the act charged but claims that it should not be punished because of the wrongdoing of the officer originates the idea of the crime and then induces the other person to engage in conduct constituting such a crime when the other person is not otherwise disposed to do so.

Section 503(b) is substantively similar to 11 Del. C. § 432(b), providing an exception to the entrapment defense where the defendant threatens or causes physical injury. But, Subsection (b) does not carry forward the exception to the exception, which would allow the entrapment defense where the defendant threatens or causes physical injury to the law enforcement officer or agent perpetuating the entrapment. Allowing the entrapment defense in those cases is inconsistent with Delaware's approach to entrapment generally, which focuses on the offender's predisposition to commit an offense, rather than on the impropriety of law enforcement's conduct. The predisposition formulation accepts that having an entrapment defense is a useful device for shaping the conduct of police, but purposefully sets the bar higher than other formulations before the defense may be used by a defendant. Carving cases of threats and physical injury against the entrapper goes against the purpose of having the predisposition formulation. Furthermore, it is difficult to justify threats and violence for any reason, even if they are elicited by what would otherwise be entrapment.

Comment on Section 504. Prior Prosecution for Same Offense as a Bar to Present Prosecution

Corresponding Current Provision(s): 11 Del. C. § 207

Comment:

Generally. Section 504 sets out the rules governing the effect of prior prosecutions for the same offense. This provision protects a defendant's Fifth Amendment right not to be tried or punished twice for the same offense.

Relation to current Delaware law. Section 504 is substantially similar to 11 Del. C. § 207 in all respects. Yet, note that the definitions of "acquittal," "conviction," and "improperly terminated" have been moved to the definitions section for Chapter 500, Section 510, making it easier to refer to and apply those terms in Sections 505-07.

Comment on Section 505. Prior Prosecution for Different Offense as a Bar to Present Prosecution

Corresponding Current Provision(s): 11 Del. C. § 208

Comment:

Generally. Section 505 sets out the rules governing the effect of prior prosecutions for a different offense. This provision requires, in certain circumstances, that different crimes arising out of the same conduct be tried together. Like Section 504, this provision protects a defendant's Fifth Amendment rights by preventing the prosecution from relitigating a factual issue decided in the defendant's favor at a previous trial.

Relation to current Delaware law. Section 505 is substantially similar to 11 Del. C. § 208 in all respects.

Comment on Section 506. Prior Prosecution by Another Jurisdiction as a Bar to Present Prosecution

Corresponding Current Provision(s): 11 Del. C. § 209

Comment:

Generally. Section 506 sets out the rules governing the effect of prior prosecutions by different jurisdictions. Like Section 504, this provision protects defendants from multiple prosecutions for the same acts. The rationale for this defense applies even though the prosecution occurred in a different jurisdiction.

Relation to current Delaware law. Section 506 is substantially similar to 11 Del. C. § 209 in all respects.

Comment on Section 507. Prosecution Not Barred Where Prior Prosecution Was Before a Court Lacking Jurisdiction, or Was Fraudulently Procured by Defendant, or Resulted in Conviction Held Invalid

Corresponding Current Provision(s): 11 Del. C. § 210

Comment:

Generally. Section 507 excludes various cases where former prosecutions should not act as a bar to later prosecutions, because either: (1) the original court lacked jurisdiction to hear the case; (2) the defendant surreptitiously obtained the prior prosecution with the intent of avoiding a harsher sentence; or (3) the prior conviction was later invalidated.

Relation to current Delaware law. Section 507 is substantially similar to 11 Del. C. § 210 in all respects.

Comment on Section 508. Prosecutorial Grant of Immunity

Corresponding Current Provision(s): 11 Del. C. § 475; *see also* 16 Del. C. § 4769

Comment:

Generally. Section 508 provides a defense for a defendant who has been granted immunity from prosecution for an offense by the Attorney General, or otherwise by operation of law, but is nevertheless prosecuted for the immunized offense. The defense is available both for the specific offense against which the defendant was immunized, as well as any offense that would have been barred from prosecution under proposed Section 505 had the defendant been prosecuted for the specific offense. Yet, Section 508(b) allows the Attorney General, in granting immunity, to stipulate that the immunity only applies to the specific offense. In that case, the defense under Section 508 is unavailable for any offense except the specifically immunized offense.

Relation to current Delaware law. Section 508 is substantially similar to 11 Del. C. § 475, but with four minor changes. First, based upon the Delaware Supreme Court's interpretation of § 475 in *Collins v. State*, Section 508 recognizes that the text of § 475 accidentally omits a critical phrase that the General Assembly intended to be included. 420 A.2d 170 (Del. 1980). Therefore, Section 508 incorporates both 11 Del. C. § 475 and the Delaware Supreme Court's holding in *Collins v. State*. Second, Subsection (a) adds the phrase "or his or her designee" to make explicit something implied in § 475: that the Attorney General can delegate the power to grant immunity to Deputy Attorneys General or other proper individuals within the Department of Justice. Third, Subsection (a) adds the phrase "or otherwise by operation of law" to include grants of immunity that arise automatically by operation of law. This gives effect, for example, to 16 Del. C. § 4769, incorporated into the Proposed Code in Section 5208, which grants immunity for certain drug- and alcohol-related offenses in life-threatening emergencies. This also makes it unnecessary to specify that grants of immunity may, in some cases, come from the Attorney General's deputies or a court order: any immunity generated by an authorization provided elsewhere in the law is covered under Section 508. Finally, Section 508(b) interprets the following provision in § 475: ". . . provided, that the Attorney General or a Deputy Attorney General may, in granting immunity, stipulate that the immunity applies only to a specific offense, in which case effect shall be given to the stipulation." By following immediately after the provision enabling a grant of immunity to extend to other offenses in certain circumstances, this language appears to defeat that extension where stipulated. Therefore, Section 508(b) more simply creates an exception to Subsection (a)(2) where that stipulation is made.

Note that the burden of persuasion for this defense remains unchanged, despite the text of Subsection (a) stating "a person has *a defense*" instead of an "affirmative defense." Proposed Section 501(c) sets the burden of persuasion on the defendant to prove all defenses and bars to prosecution in Chapter 500 by a preponderance of the evidence—the same as for affirmative defenses in current law.

Comment on Section 509. Definitions

Corresponding Current Provision(s): 11 Del. C. §§ 207, 222(3)

Comment:

Generally. This provision defines key terms introduced in Chapter 500.

Relation to current Delaware law. Section 509(a)-(c), defining "acquittal," "conviction," and "improperly terminated," directly corresponds to the definitions contained in the text of 11 Del. C. § 207(1) and (3)-(4). Section 509(b) also corresponds to 11 Del. C. § 222(3).

Section 509(d), defining "nonexculpatory defense" to mean any defense or bar to prosecution, pleading, trial, or sentencing described in Chapter 500, is newly created.

LIABILITY OF ORGANIZATIONS

CHAPTER 600. LIABILITY OF ORGANIZATIONS

Section 601. Criminal Liability of Organizations
Section 602. Criminal Liability of an Individual for Organizational Conduct
Section 603. Definitions

Comment on Section 601. Criminal Liability of Organizations

Corresponding Current Provision(s): 11 Del. C. §§ 281, 283

Comment:

Generally. Section 601 sets out the circumstances under which a corporation or other non-human entity may be held criminally liable for its actions. Liability is imposed on organizations in certain circumstances to deter their agents from violating the law or failing to perform a legal duty.

Relation to current Delaware law. Section 601(a) is substantially similar to 11 Del. C. § 281, allowing an organization to be held criminally liable for its failure to perform an affirmative duty imposed by law, or for conduct caused or recklessly tolerated by managers or directors of the organization, or for conduct performed by agents of the organization in certain cases.

Section 601(b) preserves the provision in 11 Del. C. § 283 that specifies that it is no defense to prosecution of an organization that the organization's rules did not permit the conduct charged to constitute the offense. This Section replaces the ambiguous term "impermissible organizational activity" with the clearer phrase "activity prohibited by the organization's bylaws, policies, procedures, rules, or other standards of conduct," but the provision is otherwise unchanged.

Comment on Section 602. Criminal Liability of an Individual for Organizational Conduct

Corresponding Current Provision(s): 11 Del. C. § 282

Comment:

Generally. This provision prevents individuals from escaping liability by virtue of having acted on behalf of an organization, and establishes that individuals may be punished fully as individuals, even if their liability stems from the actions of the organization of which the individuals are members.

Relation to current Delaware law. Section 602(a)(1) is the same as 11 Del. C. § 282, although it has been edited slightly for clarity. Subsection (a)(2) has no corresponding provision in current law and has been added, based upon Model Penal Code § 2.07(6)(b), to clarify an ambiguity in § 282. Current § 282 could be construed to only apply to commission liability, not omission liability. Where criminal liability of an organization can be based on omission liability, that interpretation would shield an organization's agent from individual liability. But, that result

seems inconsistent with the intent of § 282, which is to ensure organizational agents can be held personally responsible for their criminal acts on behalf of the organization. The goal of Subsection (a)(2) is to stress that when a "duty to act is imposed by law upon an organization" a legal duty (as provided for in Section 204(b)) is also imposed on certain individuals in the organization. Specifically, Subsection (a)(2) addresses high managerial agents of an organization having primary responsibility to perform, on behalf of the organization, the duties imposed by law upon the organization. If an agent is at least reckless as to the fact that she has such primary responsibility, then she can be held legally accountable for the omission to the same extent as the organization. Note, however that Subsection (a)(2) only imposes a legal duty on the agent (as provided for in Section 204(b)). The agent's ultimate liability for her omission to act will be determined in accordance with the underlying offense.

Section 602(b) has no corresponding provision in current law. It clarifies an ambiguity in Subsection (a) about the proper punishment for an individual who is personally liable for conduct that also generates criminal liability for the individual's organization. Subsection (b) provides that the punishments prescribed for individuals violating a given offense will apply to these individuals as well, despite the fact that the prescribed punishment for an organization committing the same offense may be different, or even less severe. This ensures that individuals who commit the same offense receive the same treatment, regardless of the particular reason why the offense is committed (i.e., for personal reasons or on behalf of an organization).

Comment on Section 603. Definitions

Corresponding Current Provision(s): 11 Del. C. § 284

Comment:

Generally. This provision provides definitions for defined terms that are either first used in, or most closely related to, Chapter 600.

Relation to current Delaware law. These definitions are nearly identical to those in 11 Del. C. § 284, though some are slightly reworded for clarity. The current term "agent" has been replaced with "agent of the organization" for definition purposes to make sure that other uses of the word "agent" throughout the Proposed Code are not interpreted to have this specific meaning.

INCHOATE OFFENSES

CHAPTER 700. INCHOATE OFFENSES

Section 701. Criminal Attempt
Section 702. Criminal Solicitation
Section 703. Criminal Conspiracy
Section 704. Unconvictable Confederate No Defense
Section 705. Defense for Victims and for Conduct Inevitably Incident
Section 706. Defense for Renunciation Preventing Commission of the Offense
Section 707. Grading of Criminal Attempt, Solicitation, and Conspiracy
Section 708. Possessing Instruments of Crime

Comment on Section 701. Criminal Attempt

Corresponding Current Provision(s): 11 Del. C. §§ 531, 532; *see also* § 542

Comment:

Generally. Section 701 defines the requirements for liability for an attempt to commit an offense. Attempts are subject to liability because, like completed offenses, they involve a culpable mental state and overt conduct. Yet attempts differ from completed offenses in that, due either to fortuity of circumstance or the actor refraining from further conduct, the offense's resulting harm does not occur, or occurs to a lesser extent.

As defined in Section 701(a), attempt liability requires that a person engage in some conduct that would constitute a "substantial step toward commission of the offense." Attempt liability, like criminal liability generally, requires an overt act. The general requirement of an act ensures that the criminal law does not punish "mere thoughts." The specific requirement of a "substantial step" ensures that the law does not punish "mere preparation," where the actor still has an opportunity to recant and abandon her criminal plan. This way, only would-be criminals who have shown a certain degree of firmness of criminal intent are subject to liability. The performance of an overt act amounting to a substantial step also supplies evidence that the actor did, in fact, have a culpable mental state.

Relation to current Delaware law. Section 701(a) is very similar to 11 Del. C. § 531, but with two important differences. First, Section 701(a) combines some of the language of § 531(1)–(2), which present two alternative ways that a defendant could be found to have attempted an offense, resulting in a provision that is flexible enough to cover both. The requirement of a "substantial step" in § 531(2) is applied to all attempts, but only the intent requirement of § 531(1) is retained, so that the defendant need only have intended to complete the offense. The "substantial step" takes the place of the completed conduct in § 531(1). Second, Subsection (a)(1) is added to clarify an ambiguity in current law that may make it more difficult to prosecute some attempts than their corresponding completed crimes. Although § 531(1) requires that the defendant's culpability as to the underlying offense conduct be "intentional," current law is silent as to the defendant's required culpability for circumstance and result elements of the offense. But reading § 531 to require intent as to *all* elements of an offense leads to irrational, undesirable outcomes. For example, many bases of rape and unlawful sexual

contact in current law depend upon the age of the victim. 11 Del. C. § 762(a) provides strict liability, for sexual offenses, as to the circumstance element of a victim being less than 16 years of age. In other words, no culpability is required for that element. But, if § 531 is read to raise the culpability of all elements to intent, a defendant would have to intend that the victim of rape be under age 16 to be found guilty of attempted rape. To avoid these situations, Section 701(a)(1) specifies that, as to the result and circumstance elements of an offense, the defendant need only have the culpability required for the completed offense to be found guilty of the attempted offense.

Section 701(a)(2) retains the language of 11 Del. C. § 531(2) that the intended conduct would be an offense "under the circumstances as the defendant believes them to be." This language allows for liability where, because the offender is mistaken as to the circumstances, the crime she attempts would be impossible to commit. Yet, this must be read in conjunction with the rules governing mistakes in proposed Section 206 to ensure that a defendant's mistaken belief that a circumstance does or does not exist only relieves her of liability if the mistake negates the culpability required by the offense. For example, Subsection (a)(2) does not relieve a defendant of liability for attempting an offense that requires recklessness as to a circumstance element when the defendant's mistake regarding that element is recklessly held. As required by Section 206, the mistake must still be negligently or reasonably held to negate the recklessness required by the offense element.

Section 701(b)(1) corresponds to the general definition of a "substantial step" in 11 Del. C. § 532, but with a few changes. First, "intention to commit the crime" in § 532 is replaced with "intention to engage in the offense conduct." This is done to avoid the same ambiguity, discussed above in the Commentary on Section 701(a)(1), regarding the required culpability for the result and circumstance elements of the completed offense. Second, the language of the standard in § 532, that the evidence must leave "no reasonable doubt as to the defendant's intention to commit the crime which the defendant is charged with attempting," has been altered to a standard of "strong corroboration." This change is not intended to change the function of the substantial step requirement, which is to prevent criminalization of mere thought and capture actual preparation for the offense. But the requirement of leaving "no reasonable doubt," using the State's burden of persuasion as the relevant standard, seems to require that the State be able to actually prove the elements of the offense itself by the conduct constituting a substantial step towards its completion. If so, the distinction between attempted and completed offenses, if any, would become meaningless. The change in language is intended to remove the potential confusion that would impose a heightened burden on the State to prove an attempt. Note that Delaware's current definition of a "substantial step" is a unique outlier among criminal codes in the United States.

Third, Section 701(b)(2) establishes that a person satisfies the substantial step requirement if she believes she has completed the conduct constituting an offense, or believes she has committed the last act needed to cause a prohibited result. Subsection (b)(2) does not alter the standard of Subsection (b)(1), but merely establishes a bright-line rule that performing all the requisite conduct toward an offense will always meet the substantial step test. There is no directly corresponding provision in current law.

Grading criminal attempt. The grade of the offense is contained in Section 707. For a discussion of the proposed grade for criminal attempts, see the Commentary for Section 707.

Exemption of law enforcement officers. 11 Del. C. § 542 has not been included in Chapter 700 because the justification defense for execution of a public duty in proposed Section 303 is sufficient to cover inchoate "offenses" by undercover agents.

Comment on Section 702. Criminal Solicitation

Corresponding Current Provision(s): 11 Del. C. §§ 501, 502, 503

Comment:

Generally. Section 702 provides for liability for a person who solicits another person to commit an offense. The offense of solicitation recognizes that a person who intends to promote an offense, and is willing to instigate such conduct, merits criminal liability. The independent act of solicitation takes the place of the "substantial step" toward commission of the offense required for attempt liability, or the "overt act" toward commission of the offense required for conspiracy liability.

Relation to current Delaware law. Section 702 is similar to 11 Del. C. §§ 501–03, but with one modification that tracks Section 701's modifications to attempt. *See* proposed Section 701(a) and corresponding Commentary. For offense elements other than conduct (which requires intent) the person need only act with the culpability required by the underlying offense. This language prevents an elevation of culpability levels for circumstance and result elements that could lead to undesirable outcomes. The language in Section 702(a)(2) that the conduct "would constitute the offense under the circumstances as the defendant believes them to be," should be interpreted the same both here and in Section 701(a)(2). *See* Commentary to proposed Section 701(a)(2).

Section 702(b) has no directly corresponding provision in current law. Subsection (b) makes clear that a person need not actually communicate with another to be held liable for solicitation, provided the person's conduct is designed to effect that communication. The person's endeavor to communicate her criminal intentions makes her culpability clear; it does not matter that, by chance, the communication was never received. For example, under Subsection (b), a person sending a letter soliciting another to commit murder would not escape liability simply because the letter was not received. This approach has the benefit of avoiding the need for, or possibility of, an offense for "attempted solicitation." Delaware courts have not expressly ruled on whether a solicitation must be successfully received or heard by the solicited person in order for a defendant to be found guilty of solicitation. But Delaware law focuses on the solicitor himself, rather than the solicited person, so this rule is consistent with current law. *Sheeran v. State,* 526 A.2d 886, 891 (Del. 1987). Solicitation "does not require assent or agreement by the person solicited," *id*. at 891, "[n]or does it require that the other party take any action pursuant to the solicitation." *Id*. Instead, once the solicitor's "momentary act of request or command" is complete, the offense "requires no subsequent act by the solicitor or by the person to whom the request was made." *Id*.

Note that the language of complicity in 11 Del. C. §§ 501–03, "which would establish the other's complicity in its commission or attempted commission," is not included in Section 702. Instead, the interaction between complicity and inchoate offenses is included in Section 211, which governs all aspects of accountability for the conduct of another.

Grading criminal solicitation. The grade of the offense is contained in Section 707. For a discussion of the proposed grade for criminal solicitation, see the Commentary for Section 707.

Comment on Section 703. Criminal Conspiracy

Corresponding Current Provision(s): 11 Del. C. §§ 511, 512, 513, 521, 522

Comment:

Generally. Section 703 establishes liability for the offense of conspiracy, which is committed when two or more persons enter into an agreement to commit a crime. Conspiracy differs from other inchoate offenses in that criminal enterprises are considered harmful in and of themselves, rather than merely insofar as they are unsuccessful efforts to commit other substantive offenses. Conspiracy liability, like attempt liability, requires more than mere intent to commit a crime; an "overt act" in furtherance of the conspiracy is also necessary.

Relation to current Delaware law. Section 703 corresponds to the current conspiracy provisions in 11 Del. C. §§ 511–13 and 522. Section 703(a) is similar to the current provisions, but includes the alterations reflected in the other proposed inchoate offenses: focusing on the conduct and culpability requirements defined in the underlying offense rather than imposing a uniform "intent" requirement, and denying an impossibility defense. *See* Commentary for proposed Sections 701 and 702. Like the proposed attempt and solicitation provisions, Section 703(a)(2) imposes liability where the intended conduct "would constitute the offense under the circumstances as the defendant believes them to be." This reflects the current practice of Delaware to allow prosecution for unilateral agreements. It imposes liability on any person who agrees with another to commit a crime, even if the agreement is that only one person will engage in conduct constituting a crime, and even if the other person does not actually agree to the conspiracy at all. *See Saienni v. State*, 346 A.2d 152, 154 (Del. 1975) ("Defendant argues that he cannot be guilty of conspiracy with an established police informer and an undercover agent who had not intention of committing the crime. We find no merit to this argument. . . ."). The Court in *Saienni* identified the possibility of unilateral conspiracies in 11 Del. C. § 523(2). That provision, however, is incorporated in a different form in proposed Section 704. This addition ensures that unilateral conspiracies continue to be prosecuted.

Section 703(a)(4) explicitly applies the overt act requirement to all cases of conspiracy liability, an ambiguity in current law that was resolved in favor of this change in *Weick v. State*, 420 A.2d 159, 164 (Del. 1980) ("[We agree that] the overt act requirement is applicable to both § 512(a) and (2)."). Note that the current language, that the overt act is performed "in pursuance of" the conspiracy, is replaced in Section 703(a)(4) with "in support of" the conspiracy to improve ease of reading. It is not intended to substantively alter the nature of the relationship between the overt act and the conspiracy that current law requires.

Section 703(b), providing that co-conspirators need not know each other's identity so long as they have a known co-conspirator in common, directly corresponds to 11 Del. C. § 521(b).

Section 703(c), setting rules of joinder and venue for conspiracy prosecutions and giving courts discretion to remedy prejudicial joinder, directly corresponds to 11 Del. C. § 522. Some aspects of the current provision have been broken into their constituent elements for readability, but the substance of the provisions is identical.

Grading criminal conspiracy. The grade of the offense is contained in Section 707. For a discussion of the proposed grade for criminal conspiracy, see the Commentary for Section 707.

Conspiracy with multiple criminal objectives. 11 Del. C. 521(a), barring multiple convictions for a single conspiracy to commit several offenses, has not been included in Section 703. This provision, taken directly from Model Penal Code § 5.03(3), is a conceptual error in the Model Penal Code that contradicts the principles underlying the function of the conspiracy inchoate offense in both the MPC and current Delaware law. Delaware does not treat conspiracy as a substantive offense targeting the harm or evil of group criminality. If it did, then conspiracy would not merge with the target offense of the conspiracy. Instead, conspiracy is an inchoate offense, which merges with the target offense, and which seeks to cut off criminal activity in its preparation phase. 11 Del. C. § 521(a) makes sense if the group criminality of conspiracy were being punished independently: multiple objectives of the conspiracy would make no difference to the defendant's blameworthiness, and multiple convictions would unjustly multiply punishment. But, if conspiracy is an inchoate offense, it does make sense to punish conspiracies to commit each offense that is the target of a conspiracy. It does not unjustly multiply punishment, because the "conspiracies" merge with each target offense, if completed. To do otherwise would irrationally *under*-punish conspiracies when compared to other inchoate offenses. For example, a defendant could be tried and convicted for attempted murder and attempted theft committed in the same course of conduct. But, if that person conspired with another person to murder and steal, § 521(a) would only allow conviction for conspiracy to commit murder. Given the common principles underlying inchoate offenses, in both current Delaware law and the Proposed Code, multiple convictions should be consistently available.

Comment on Section 704. Unconvictable Confederate No Defense

Corresponding Current Provision(s): 11 Del. C. § 523

Comment:

Generally. Section 704 makes clear that a person may not escape liability for conspiracy or solicitation solely because the co-conspirator or solicited person is not subject to prosecution or conviction for the same offense. An actor's blameworthiness for an inchoate offense pursuing a criminal objective is not contingent on the status of any other person involved in the enterprise or endeavor. For example, where one member of a conspiracy manipulates or coerces another person who lacks the capacity to appreciate the criminality of his conduct, the manipulator should not escape liability merely because the confederate cannot be found criminally liable. Indeed, the manipulative co-conspirator is arguably even more culpable in that situation. This is consistent with the unilateral-agreement rule for conspiracy. *See* Commentary for proposed Section 703(a). Like current law, solicitation is also subject to Section 704, which makes clear that the solicitation is complete upon an attempt to communicate the solicitation, regardless of whether the communication is received, or whether the solicited person acts upon the defendant's solicitation.

Relation to current Delaware law. Section 704 corresponds to 11 Del. C. § 523, but is more general. Current § 523 avoids limiting liability based on the status of another person involved in the inchoate offense, but does so by specifying the reasons why a co-conspirator or solicited person might fare differently than the defendant. This creates the possibility for

confusion if the other person receives different treatment, but for a reason other than one expressly provided. It is not clear under current law whether the reasons given are exclusive or not. To avoid this possibility, Section 704 instead only specifies the ways in which the courts or law enforcement might treat another party differently, not the reasons for the different treatment. This way, the focus in a conspiracy or solicitation prosecution will remain on the defendant's acts and culpability.

Comment on Section 705. Defense for Victims and for Conduct Inevitably Incident

Corresponding Current Provision(s): 11 Del. C. § 521(c)

Comment:

Generally. Section 705 provides a defense to the offenses of solicitation and conspiracy where the defendant is a victim of the offense, or her conduct is inevitably incident to its commission. Section 705(a) protects people who are victims of the underlying offense—such as, for example, a person who agrees to pay money to an extortionist, thereby technically entering into a "conspiracy" with the extortionist.

Section 705(b) covers situations where, because a person's conduct is ancillary to the underlying crime, it is unclear whether the person should be held liable. Current Delaware law makes a similar provision in the form of an exception to accomplice liability. *See* Section 212(b) and its corresponding Commentary. Extending a similar defense to solicitation and conspiracy can be useful in special situations. For example, it is not clear whether an unmarried partner should be liable for conspiracy to commit bigamy, or whether the purchaser should be liable for conspiracy to traffic in stolen goods. Under Section 705(2), the General Assembly would still be free to decide on a case-by-case basis that those people should be subject to liability by writing the specific underlying offense to reflect that understanding. Conspiratorial associations are intended to be included in inevitably incident conduct, thereby allowing Section 705(2) to preserve Wharton's Rule. Wharton's Rule prevents conviction for conspiracy to commit an offense if the elements of the offense require more than one person to commit it. That reasoning applies as well to other inevitably incident conduct, both in conspiracy and solicitation, so the defense has been expanded.

Relation to current Delaware law. Although no provision in Title 11 directly corresponds to Section 705, 11 Del. C. § 521(c) provides a statutory version of Wharton's Rule in conspiracy liability.

Comment on Section 706. Defense for Renunciation Preventing Commission of the Offense

Corresponding Current Provision(s): 11 Del.C § 541

Comment:

Generally. Section 706 provides a defense for persons who, after committing an inchoate offense, voluntarily renounce their criminal purpose and prevent the inchoate offense from becoming a completed offense. As Section 706(b) makes clear, however, renunciation is not "voluntary" when it is merely a response to a fear of being caught, or a tactical decision to

pursue the crime in a different way, or at a different time. Under Section 706(c), the defendant would bear the burden of proving this defense by a preponderance of the evidence.

Relation to current Delaware law. Section 706 is substantially similar to 11 Del. C. § 541. Section 706(a) combines § 541(a)–(b) and has an identical effect: establishing a defense to an inchoate offense where, after satisfying the elements of an inchoate offense, the defendant prevents the commission of the offense because of a genuine motivation to renounce her criminal purpose. Current § 541(b), dealing with attempts, specifies that merely abandoning the criminal activity may be sufficient for a renunciation defense. But if that abandonment is sufficient to prevent commission of the offense, Section 706(a) produces the same result.

Section 706(b) directly corresponds to § 541(c), defining when a renunciation is not considered "voluntary and complete." This provision makes clear that renunciation will not provide a defense if it is motivated by a fear of apprehension, or a decision to pursue the crime at another time or against a different victim.

Note that by classifying this as a defense, the burden of persuasion is placed on the defendant to establish it by a preponderance of the evidence. *See* proposed Section 106(b)(2) and corresponding Commentary.

Comment on Section 707. Grading of Criminal Attempt, Solicitation, and Conspiracy

Corresponding Current Provision(s): 11 Del. C. §§ 501, 502, 503, 511, 512, 513, 521(a), 531

Comment:

Generally. Section 707 grades all inchoate offenses one grade lower than the most serious offense attempted, solicited, or agreed to. This system relates the seriousness of the inchoate offense to that of the underlying offense, but recognizes that the inchoate offense does not generate the resulting harm with which the underlying offense is concerned.

Relation to current Delaware law. Section 707 introduces consistency to the grading of inchoate offenses. Current Delaware law does not have a single rule governing the proper grade for an inchoate offense relative to a completed offense, and instead provides separate grading rules for each type of inchoate offense. The system in Section 707 follows two general principles that are present in the current grading system for conspiracy and solicitation, to varying extents. The first principle is that the grade of the inchoate offense should vary according to the seriousness of the offense that the defendant intended should take place. The second principle is that, because the harm of the underlying offense does not occur, the inchoate offense must be graded lower than the underlying offense. Yet, the defendant's full intention to see that harm brought about still requires significant punishment.

In current law, these principles are all expressed, but are applied differently to each inchoate offense, resulting in inconsistent or disproportionate grading depending on the inchoate offense involved or the grade of the underlying offense. Under current law, both solicitation and conspiracy of the first degree apply only to Class A felonies, and each inchoate offense is graded as a Class E felony. *See* 11 Del. C. §§ 503 and 513. This is a very substantial discount in punishment given the egregious nature of the felony, and the defendant's full intention to carry it out. The second degrees of conspiracy and solicitation apply to all other felonies, from Classes B through G. *See* 11 Del. C. §§ 502 and 512. But, the inchoate offenses are each graded as Class F felonies, regardless of the specific grade of the underlying felony. For Class B through E

felonies, this creates a grade discount (and, paradoxically, the discount becomes larger the more serious the underlying felony involved). But for Class F felonies, the inchoate offense is punished identically; and for Class G felonies, the inchoate offense is punished more harshly than if the defendant had actually succeeded at completing the offense. The same problem of over-punishment is also present in the third degrees of complicity and conspiracy, which are graded as Class A misdemeanors for any underlying misdemeanor offense, even Class B and unclassified misdemeanors. *See* 11 Del. C. §§ 501 and 511. If an inchoate offense is graded more harshly than the completed offense, it fails to create an incentive for a person to cease her course of criminal conduct. In fact, it actually creates an incentive to make sure the offense is completed, because the defendant will be subject to lesser liability if prosecuted for the completed offense than the inchoate offense.

Grading of criminal attempt in 11 Del. C. § 531 has the virtues of uniform grading for all attempts, and taking the defendant's intent to complete the crime seriously. But, the grade of an attempt under § 531 is always the same as the completed offense. This approach, first introduced by the Model Penal Code, is one of the few aspects of the Model Code to be nearly universally rejected. The reasons for its rejection have already been stated: it fails to take into account the lack of resulting harm from the completed offense. Additionally, like over-punishment, equal punishment fails to provide an incentive for the person to cease the course of conduct. The renunciation defense in Section 706 provides some incentive here; but, if the person is not certain the renunciation will be successful, there is no difference in punishment to encourage the person to try anyway.

Instead of these varying, contradictory approaches, Section 707 proposes a single, uniform rule: the inchoate offense is one grade lower than the completed offense. This provides the same discount for resulting harm in all cases, does not allow a person to be punished more for failing than succeeding, and prevents defendants who intend to commit serious felonies from being punished too leniently. Section 707 ensures that the grade of the inchoate offense is always based upon "the most serious offense attempted or solicited, or is an object of the conspiracy." This takes the current provision in 11 Del. C. § 521(a) regarding grading for conspiracy and applies it to all inchoate offenses for uniformity.

Note that in 11 Del. C. §§ 502–03, the grade of the first and second degrees of criminal solicitation can be adjusted upward based upon the ages of the defendant and the person solicited to commit the offense conduct. This adjustment is not preserved in Section 707 because, in the most serious cases, the proposed grading scheme already sets the grade of solicitation above what it would be with the adjustment.

Comment on Section 708. Possessing Instruments of Crime

Corresponding Current Provision(s): Various; *see, e.g.,* 11 Del. C. §§ 812(b), 828, 850(a)(1), 860, 862, 937, 1401(a); 21 Del. C. §§ 4601, 4604, 6708, 6710

Comment:

Generally. Section 708 establishes an offense for the possession of instruments of crime. Section 708(a) defines the offense to prohibit possession of an instrument of crime with intent to

use it criminally, incorporating the definition of what is an "instrument of crime." Section 708(b) grades the offense as a Class A misdemeanor.

Relation to current Delaware law. Title 11 includes no general possession offense, but includes numerous specific offenses criminalizing the possession of various instruments of crime. *See, e.g.*, 11 Del. C. § 812(b) (defining a Class B misdemeanor for possessing graffiti instruments); § 828 (defining a Class F felony for possessing burglar's tools); § 850(a)(1) (defining an offense of variable grade for possessing devices to steal telecommunications services); § 860 (defining a Class F felony for possessing shoplifter's tools); § 862 (defining a Class G felony for possessing forgery devices); § 1401(a) (defining a Class A misdemeanor for possessing items for unlawful gambling). Additionally, Title 21 on Motor Vehicles includes a handful of possession offenses that lend themselves to being combined with the Title 11 offenses into a general offense for possessing instruments of crime. *See, e.g.*, 21 Del. C. § 4601 (defining a Class E felony for sale and distribution of motor vehicle master keys); § 4604 (defining a class E felony for possessing motor vehicle master keys); § 6708 (defining a Class E felony for possessing blank title or registration instruments); § 6710 (defining a Class E felony for unlawfully possessing titles assigned to motor vehicles). Section 708 replaces these offenses with one concise and consistent offense definition, which is based upon Model Penal Code § 5.06(1).

Note that the exceptions to liability under 21 Del. C. § 4604(b) are covered by Section 708 because the users included in the exception would not have the necessary intent to employ the master keys criminally. Additionally, the requirement in 21 Del. C. § 6710 that the defendant fail to accompany the assigned title with 75% of the vehicle it applies to will, under Section 708, be treated as evidence of the defendant's intent to employ the title fraudulently.

OFFENSE GRADES AND THEIR IMPLICATIONS

CHAPTER 800. OFFENSE GRADES AND THEIR IMPLICATIONS

Section 801. Offense Grades
Section 802. Authorized Terms of Imprisonment
Section 803. Authorized Fines; Restitution
Section 804. General Adjustments to Offense Grade
Section 805. Valuation of Property for the Purposes of Grading
Section 806. Definitions

General Comments Regarding Chapter 800:

Chapter 800 is not intended to address all issues regarding the sentencing and disposition of offenders. It is anticipated that such issues will be more comprehensively dealt with in other statutory chapters on sentencing or in a set of sentencing guidelines. Chapter 800 only deals with those basic issues necessary to clarify the meaning of the Proposed Code's general scheme of offense grading. Chapter's 800's silence as to more complex sentencing issues does not indicate a lack of awareness or concern about such issues, but an understanding that they are beyond the scope of the current phase of this project. Therefore, Chapter 800 does not incorporate the sentencing or specialized procedural provisions currently found alongside the grading provisions in Chapter 42 of Title 11.

Comment on Section 801. Offense Grades

Corresponding Current Provision(s): 11 Del. C. §§ 4201(a)–(b), 4202, 4203

Comment:

Generally. This provision provides a classification of all criminal offenses, as well as offenses defined outside the Code, into grades for purposes of determining the extent of liability.

Relation to current Delaware law. Section 801(a) directly corresponds to the current system of grading offenses under Delaware law, found in 11 Del. C. §§ 4201–03. Yet, the grade names and number have been changed in several ways. First, to keep a consistent form with other grades authorizing imprisonment, "unclassified misdemeanors" have been changed to "Class D misdemeanors." More importantly, a new category of Class C misdemeanors has been added. Current Delaware law does not contain a step in sentences between 30 days and 6 months' authorized imprisonment—a steep difference. The Commentary to Section 802 explains the reasoning behind this addition.

Second, the grades of felonies have been expanded in some ways, and condensed in others. The felony classes have been given numerical designations instead of numbers to create a distinction between misdemeanor and felony designations, and to make it easier to set proportional maximum punishments at each grade level without forcing a comparison to those set under current law. This Section proposes eight felony grade levels instead of seven, as under current law, to allow for a grading distinction to be made between the most serious felonies.

What are currently Class A and B felonies are proposed to be spread across felony Classes 1–4. The legislation authorizing this Proposed Code mandates that "disproportionate" statutes be identified and rectified. The proportionality of an offense's authorized punishment is directly tied to the grade assigned to that offense. The nonpartisan consultative group supervising the drafting process for this Proposed Code has scrutinized the relative grading of all offenses, and has decided that the lack of grade distinctions at the high end of the felony classification scheme forces a number of offenses to be graded similarly that should not be. The remaining four felony classes cover what are currently Class C–G felonies, condensing five current classes into four. This is because of the closeness of the maximum sentences of Class G and F felonies under current law (2 and 3 years, respectively). As is discussed in the Commentary to Section 802, it is proposed that the maximum sentences all felony grades shift to accommodate these changes.

Section 801(b) provides a system by which offenses defined outside the Code will be graded uniformly with offenses inside the Code. The highest grade available for offenses defined only by terms of imprisonment is a Class A misdemeanor. When combined with Subsection (b)(2)(A), the effect is to make it impossible for *ad hoc* administrative legislation to create felonies without consciously fitting them into the Code's scheme. This replaces 11 Del. C. § 4201(b). The same effect is created by Subsection (b)(2)(B) for misdemeanors: serious misdemeanors cannot be created without consciously using the Code's scheme. Subsection (b)(3) follows the current code in § 4203 by treating all offenses without grades or sentences of imprisonment as misdemeanors, rather than violations.

Comment on Section 802. Authorized Terms of Imprisonment

Corresponding Current Provision(s): 11 Del. C. §§ 4205(b), 4206(a)–(c), 4207(a); *see also* §§ 234, 630(b), 630A(b), 633(d), 772(c), 778(6)b., 825(b), 826(b), 826A(b), 832(b), 1254, 1447A(b)–(c), 1448(e), 4205A, 4214, 4209(a); 21 Del. C. § 6702

Comment:

Generally. This provision establishes the maximum and, in some limited circumstances, minimum terms of imprisonment for each class of offenses. Although the working group proposes certain principled terms of imprisonment, they are left in brackets, signaling that the final decision on the exact amount of punishment should be made by the General Assembly.

Relation to current Delaware law. Section 802 consolidates the authorized terms of imprisonment for felonies, misdemeanors, and violations, which are currently found in 11 Del. C. §§ 4205(b), 4206(a)–(c), and 4207(a). Moreover, Section 802 proposes several changes, discussed below, which are due to the alterations to the grade scheme. *See* Section 801 and corresponding Commentary. All changes are proposed under the assumption that all offenses in the Proposed Code will be re-graded to ensure their maximum punishments are proportional to each other. In general, the authorized terms of imprisonment in the proposed scheme follow an exponential scale, roughly doubling with each increase in grade, up through Class 2 felonies. This focuses energy on the correct grading of offenses in terms of their relative seriousness. Additionally, it ensures that a plea to a lesser offense will always represent a significant decrease in maximum punishment, encouraging offenders to assist the prosecution.

Section 802(a)(1) proposes a new felony class, Class 1, which, like 11 Del. C. § 4209(a) requires at least mandatory life in prison, but is also eligible for the death penalty. Although the number of Class 1 felonies is small—in the Proposed Code, Aggravated Murder is the only Class 1 felony—it is useful to have a grade that distinguishes them from other Class A felonies under current law. Class 1 felonies are qualitatively more serious than Class 2 felonies, reflecting the highest level of an offender's blameworthiness and justifying life imprisonment as a guaranteed sentence.

Section 802(a)(2), like 11 Del. C. § 4205(b)(1), sets the maximum sentence for Class 2 felonies at life imprisonment. It also sets the minimum sentence at 15 years' imprisonment, following the minimum sentence for Class A felonies in current law.

Section 802(a)(3) sets the maximum sentence for Class 3 felonies at 35 years. Class 3 is a newly proposed class of felonies, which contains offenses that are considered less serious than current Class A felonies, but more serious than current Class B felonies. This provides useful additional nuance when setting the appropriate treatment of the most serious felonies. The maximum sentence for Class 3 has been set to roughly split the difference between the maximum sentences for Class 2 and Class 4 felonies.

Unlike Class 2 felonies, which have a minimum sentence for all offenses in the class due to their extreme seriousness, Class 3 and 4 felonies have minimum sentences in only certain, limited circumstances. In these cases, a minimum sentence is applicable if the felony: (1) is defined to include an element of causing physical injury, engaging in sexual conduct, or use of a deadly weapon; and (2) the defendant knowingly commits the offense. Note that "knowingly commits the elements of the offense" elevates culpability required as to every element of the offense or grade provision, not just the conduct element. The minimum sentence provisions that appear in Section 802 are the only minimum sentences in the Proposed Code, and seek to rationalize and simplify the confusing array of disparate provisions scattered throughout current law. They do so by distilling and then generally applying the principles that underlie current mandatory minimums. First, current mandatory minimum sentences are reserved for the most serious offenses—usually only Class A and Class B felonies. Therefore, Section 802 only makes minimum sentences available for Class 1–4 felonies, which correspond to Class A and B felonies in current law (see the table at the end of this Section's Commentary for a visual clarification of this point). Second, the types of crimes that carry the greatest proportion of mandatory minimum sentences under current law are crimes involving violence and physical injury, crimes of a sexual nature, and crimes involving deadly weapons and firearms. These are sensible categories of offenses to have minimum sentences, because they are offenses about which citizens are justifiably concerned about the consequences of under-sentencing, resulting in strong public support for minimum sentences in these areas. Therefore, Section 802(a)(3) and (a)(4) apply minimum sentences to only these offenses, but all instances of these offenses, ensuring no offenses are accidentally left out through piecemeal application of minimum sentences in specific offense provisions. Third, the current Delaware Code is committed to the foundational principle of criminal liability that a defendant's blameworthiness, and therefore appropriate punishment, is tied to the defendant's culpable state of mind. Therefore, Section 802(a)(3) and (a)(4) set a threshold culpability requirement for the defendant's conduct at "knowing," ensuring defendants subject to minimum sentences are blameworthy enough that a minimum sentence will not result in a miscarriage of justice. By doing so, these Sections appropriately "split" offenses that may be committed with different levels of culpability, requiring the imposition of minimum sentences only on the more blameworthy offenders acting either knowingly or intentionally.

The minimum sentence for Class 4 felonies is set at [3] years, [which is 50% more than the current mandatory minimum for all Class B felonies. The minimum sentence is raised because of the stricter requirements that must be met before a minimum sentence may be imposed.] The minimum sentence for Class 3 felonies is set at [5] years as a compromise position between Class 2 and Class 4, because Class 3 is a newly proposed class of felonies, as discussed above. Note also that 11 Del. C. § 234 clarifying that terms such as "minimum" "minimum mandatory" etc. are synonumus – is unnesessary. The minimum authorized terms of imprisonment in the Proposed Code are not determined by multiple provisions in individual offenses, but rather embedded in the grade of the offense and consistently defined in this Section.

Section 802(a)(4), like § 4205(b)(2), sets the maximum sentence for Class 4 felonies at 25 years.

Section 802(a)(5) preserves the authorized 15-year imprisonment term for Class 5 felonies under § 4205(b)(3).

Section 802(a)(6) preserves the authorized 8-year imprisonment for term Class 6 felonies under § 4205(b)(4).

Section 802(a)(7) sets the maximum sentence for Class 7 felonies at 4 years—one year less than under § 4205(b)(5). This change is proposed to ensure that maximum sentences roughly double for each grade increase. As will be seen below, the authorized imprisonment for Class F felonies has been shifted down one year as well, and for the same reason.

Section 802(a)(8) sets the maximum sentence for Class 8 felonies at 2 years—one year less than under § 4205(b)(6). This change is proposed to ensure that maximum sentences roughly double for each grade increase. Because this change makes the authorized imprisonment term for Class F felonies equal to that of Class G felonies under § 4205(b)(7), Class G has been eliminated from the proposed grading scheme.

Section 802(a)(9) preserves the authorized 1-year imprisonment term for Class A misdemeanors under § 4206(a).

Section 802(a)(10) preserves the authorized 6-month imprisonment term for Class B misdemeanors under § 4206(b).

Section 802(a)(11) proposes a new category of Class C misdemeanors, with a maximum authorized sentence of 3 months, for two reasons. First, under current Delaware law, the step from unclassified misdemeanors to Class B misdemeanors is a six-fold increase in authorized imprisonment. Having an intermediate grading step between them will be useful to more precisely grade offenses according to their relative seriousness. Second, many unclassified offenses outside the current criminal code already have maximum sentences of 3 months. *See, e.g.,* 21 Del. C. § 6702 (Driving vehicle without consent of owner).

Section 802(a)(12) preserves the default 30-day imprisonment term authorized for unclassified misdemeanors under § 4206(c). In the Proposed Code, the authorized sentences for all offenses are determined by grade. No offenses have independently authorized terms of imprisonment contained within them. For that reason, it is not necessary to carry forward the part of § 4206(c) recognizing such independent authorizations.

Section 802(a)(13) preserves § 4207(a), which provides no authorized term of imprisonment for violations. Violations are not crimes and therefore conceptually distinct from felonies and misdemeanors. They are more similar to administrative violations for which a person may be issued a ticket. As the Model Penal Code (from which the category of violations is derived) makes clear in § 1.04(5): ".... A violation does not constitute a crime and conviction of a violation shall not give rise to any disability or legal disadvantage based on conviction of a

criminal offense." Note also that under current law a violation grade entails additional important implications. For instance, 11 Del. C. § 1904 authorizes law enforcement officers to make arrests without warrants in specified circumstances, but because it only applies to felonies and misdemeanors, officers lack the authority to arrest offenders committing violations.

A summary table appears below, visually depicting how current offense grades relate to and are divided or combined differently in the proposed grade system:

<table>
<tr><th>Current Grade/Maximum Sentence</th><th>Proposed Grade/Maximum Sentence</th></tr>
<tr><td>First Degree Murder
Automatic life; death eligible</td><td>Class 1 felony
Automatic life; death eligible</td></tr>
<tr><td rowspan="2">Class A felony
Life imprisonment (min. 15 yrs.)</td><td>Class 2 felony
Life imprisonment (min. [15] yrs.)</td></tr>
<tr><td rowspan="2">Class 3 felony
35 years (possible min. [5] yrs.)</td></tr>
<tr><td>Class B felony
25 years (min. 2 years)</td></tr>
<tr><td>Class 4 felony
25 years (possible min. [3] yrs.)</td></tr>
<tr><td>Class C felony
15 years</td><td>Class 5 felony
15 years</td></tr>
<tr><td>Class D felony
8 years</td><td>Class 6 felony
8 years</td></tr>
<tr><td>Class E felony
5 years</td><td rowspan="3">Class 7 felony
4 years</td></tr>
<tr><td>Class F felony
3 years</td></tr>
<tr><td rowspan="2">Class G felony
2 years</td><td rowspan="2">Class 8 felony
2 years</td></tr>
<tr><td></td></tr>
<tr><td>Class A misdemeanor
1 year</td><td>Class A misdemeanor
1 year</td></tr>
<tr><td>Class B misdemeanor
6 months</td><td>Class B misdemeanor
6 months</td></tr>
<tr><td rowspan="2">Unclassified misdemeanor
30 days</td><td>Class C misdemeanor
3 months</td></tr>
<tr><td>Class D misdemeanor
30 days</td></tr>
<tr><td>Violation
No imprisonment authorized</td><td>Violation
No imprisonment authorized</td></tr>
</table>

Comment on Section 803. Authorized Fines; Restitution

Corresponding Current Provision(s): 11 Del. C. §§ 4204(c)(9), 4205(k), 4206, 4207, 4208; *see also, e.g.*, 16 Del. C. § 4744(a)(2) & (d)(2)

Comment:

Generally. This provision establishes the maximum fine for each class of offenses, as well as providing for mandatory restitution in certain cases. Although the working group

proposes certain principled amounts for the maximum fines, they are left in brackets, signaling that the final decision on the exact amount of punishment should be made by the General Assembly.

Relation to current Delaware law. Section 803(a) consolidates maximum fines for all felonies, misdemeanors, and violations. This proposal would significantly change current law. The current code does not set default maximum fines for any felonies. Regarding felony sentences, 11 Del. C. § 4205(k) provides that "[a] court may impose such fines . . . *as it deems appropriate*," which implies that unless a specific offense provides a maximum fine, an offender could be fined any amount of money. Although a fine of unlimited size might be appropriate for a Class 1 felony, it is much harder to justify for a Class 8 felony. Therefore, Section 803 proposes a new scheme of default maximum fines that follows the same policies as the maximum sentences proposed in Section 802. The maximum fines follow an exponential scale, roughly doubling at each class, starting from $500 for violations. As a result, in part, the maximum fines for violations and misdemeanors that currently exist in §§ 4206 and 4207 are marginally increased. The maximum fines for serious felonies are still quite high, but because these are default maximums, a higher fine could be imposed by legislation if desired. Note also that the maximum fines for misdemeanors and violations in Subsections (a)(9)–(a)(12) are roughly equivalent to the maximum fines in current law once they are adjusted for inflation into 2016 dollars.

Substantial authorized fines for all offenses should be useful tools. The punitive effect of a small fine would be felt keenly by a poor offender, but might be trivial to a wealthy offender. The range of authorized fines needs to go high enough to allow a sentencing judge to set a fine that will have a real punitive and deterrent effect upon any offender, no matter how wealthy he or she may be. Note that the proposed authorized fines are much higher than the highest maximum fines found throughout the current specific offenses. *See, e.g.*, 16 Del. C. § 4744(a)(2) and (d)(2) (setting maximum authorized fines of $100,000, $25,000, and $10,000, respectively, for Class A, D, and F felony violations of the Safe Internet Pharmacy Act).

Section 803(b) directly corresponds to the organization fine structure in 11 Del. C. § 4208. But, Subsection (b) has been reworded to make clear that the greatest maximum fine generated by the alternative calculations is the one to be applied. Note that Subsection (b)(1) enables a judge to set a fine of any amount, no matter how high, when an organization's offense results in death or serious physical injury.

Section 803(c) directly corresponds to the current restitution requirement in § 4204(c)(9).

Comment on Section 804. General Adjustments to Offense Grade

Corresponding Current Provision(s): 11 Del. C. §§ 616(c), 1105, 1239, 1304, 1449, 4214; *see also* §§ 607(a)(3), 776, 841B(c), 851, 852A, 1110, 1114A(c), 1249(d), 1361(c), 1404, 1455; 16 Del. C. § 4751B; 21 Del. C. § 4103; *see also, e.g.*, 11 Del. C. §§ 605, 606, 841(c)

Comment:

Generally. This provision allows for extended terms of imprisonment by increasing the grade of an offense by one grade where an enumerated aggravating factor is present.

Relation to current Delaware law. Currently, Delaware does not have a General Part provision that aggravates grades of specific offenses in a consistent way. Yet, numerous specific offenses include similar grade aggravations that have been collected and converted into the grade adjustments suggested in Section 804.

Section 804(a) provides a single upward grade adjustment for felons who have previously been convicted of two felonies that are graded equally to or more seriously than the present felony. Like the limited minimum sentence provisions in proposed Section 802(c) and (d), Subsection (a) seeks to rationalize and simplify the many repeat offender grade adjustment provisions scattered throughout current Delaware law. It does this by distilling and generally applying the principles that underlie the use of such grade adjustments in current law. Some of those provisions provide an upward adjustment for a third offense (for example, 11 Del. C. § 841B(c)), while others are for second and subsequent offenses (for example, 11 Del. C. § 1455). Most offenses do not provide upward grade adjustments for repeat offenders, but no pattern emerges among the offenses having those grade adjustments such that a rational subset of offense types could be identified. Yet, all of those offense-specific provisions are unnecessarily inflexible, because they only apply to offenders who repeat the same offense. Under that scheme, a person who is convicted at different times of theft, assault, kidnapping, and forgery would not be subject to an upward grade adjustment. The person has a distinct pattern of repeating serious offenses, but not the same offenses. This willingness to engage in many different serious offenses arguably makes that person more dangerous than the person who simply repeats the same kind of offense, but current law makes no provision for that person—except under 11 Del. C. § 4214, the habitual criminal statute.

Current § 4214, broadly speaking, either authorizes or mandates life imprisonment for repeat felons who engage in violent felonies, depending upon a number of factors relating to the person's prior record. This approach has the virtue of recognizing a repeat offender's dangerousness across offenses. But, § 4214 is limited due to its focus upon violent felonies. As a result, it moves directly toward life sentences, without much middle ground for middle cases. Current § 4214 is also lengthy and convoluted, making it difficult to apply.

Section 804(a) builds upon the virtues of § 4214 while seeking to maximize both flexibility and simplicity. Subsection (a) provides for an increase of one grade—which can result in a life sentence if the present offense is a Class 3 felony, but not for lesser felonies. Instead, the resulting maximum sentence is proportional to the seriousness of the present offense. Also, it is irrelevant under Subsection (a) precisely what a defendant's prior felonies were, so long as she has served time in prison for one of them during the past 10 years, and their grade is at least as high as the one for which she is presently being prosecuted. This approach provides flexibility by limiting the long-term impact of stale prior offenses while ensuring that the defendant has engaged in a pattern of offending that is sufficiently serious to justify doubling maximum punishment for the present offense. At the same time, Subsection (a) is simple and straightforward, and should be easy to apply. Note that because most repeat offender provisions in current law deal with felonies (and giving special deference to § 4214), Subsection (a) only applies to repeat felons, not misdemeanants.

Section 804(b) most closely corresponds to 11 Del. C. § 1105 (Crime against a vulnerable adult). That provision enumerates a fairly comprehensive list of offenses, and makes it a further offense to commit any of those offenses against a "vulnerable adult." 11 Del. C. § 1105(a). Current § 1105 is a hybrid between a specific offense and a general grade adjustment: it defines an offense that is separately charged, but the grade of that offense is determined by increasing

the grade of the underlying offense by one. Current § 1105(b)(3) further provides that a Class 6 felony is the highest offense grade that can be aggravated by additionally charging § 1105. But, some of the enumerated underlying offenses are presently graded higher than Class 6. *See, e.g.*, 11 Del. C. § 1105(f) (listing 11 Del. C. §§ 605–06—Abuse of a pregnant female—as an offense whose sentence may be aggravated). This illustrates the problem with a hybrid approach. If one of the enumerated offenses is amended with a higher grade, the underlying offense may no longer be eligible to be the basis of charging § 1105. At the same time, however, the list of underlying offenses conspicuously omits the most serious degrees of all the offenses included—evidence that the General Assembly intended to place an upper limit on the § 1105 grade increase.

Proposed Section 804(b) eliminates the enumerated list of underlying offenses to avoid this confusion. In recognition of both the legislative intent to limit application of the grade adjustment and the desire to retain application of the adjustment in serious cases, Subsection (e)(2) applies to unadjusted offense grades lower than Class 4 felonies, rather than Class C felonies (roughly analogous to Class 5 under the proposed scheme) as under current law. This way, the legislative intent to limit application will be consistent, even if the prevailing notion of the relative seriousness of specific offenses changes over time. Note that this approach is also more consistent with other hybrid grade adjustment–offenses in current law. *See* Section 804(c)–(d) and corresponding Commentary.

Section 804(c) establishes a grade adjustment for hate crimes, which directly corresponds to 11 Del. C. § 1304. Like 11 Del. C. § 1105, § 1304 is a hybrid offense that determines the offense's grade by increasing the grade of an underlying offense. Rather than multiply the number of offenses involved (without increasing the defendant's ultimate liability), § 1304 has been converted into a pure grade adjustment in Subsection (c). The alternative elements of the grade adjustment are taken directly from the language in § 1304(a)(1)–(2). The definitions of "sexual orientation" and "gender identity" in § 1304(a)(2) have been added, verbatim, to Section 806. Current § 1304(b) generally sets the grade of a hate crime at one grade higher than the underlying offense, but only for grades up to Class C felonies. The same practice is preserved through the interaction of Subsections (c) and (e)(2).

Section 804(d) establishes a grade adjustment for offenses committed by a criminal street gang, which corresponds to 11 Del. C. § 616(c). Unlike 11 Del. C. §§ 1105 and 1304, § 616(c) is a pure grade adjustment that applies to Class C, D, or E felonies committed by a criminal street gang. Subsection (d) maintains the same elements as § 616(c), but expands its reach to Class 8 felonies and misdemeanors. *See* Section 804(e)(2) and corresponding Commentary. This improves consistency between Subsection (d) and the other general grade adjustments in Section 804, which have no lower limit on their applicability.

Section 804(e) establishes a grade adjustment for felonies committed by offenders wearing a disguise or body armor. Subsection (e) is based upon 11 Del. C. §§ 1239 and 1449, but with significant changes. The current offenses are not grade adjustments; they are separate offenses that can apply to any felony, depending upon how the felony is committed. In that way, the offenses are similar to grade adjustments because they rely upon the commission of a predicate offense. 11 Del. C. § 1239 is a Class E felony, while § 1449 is a Class B felony. Because they are both felonies, it is possible for other offenses requiring a predicate felony to apply to those offenses as well. For example, under current law, an offender who wears a disguise and is armed with a firearm during commission of a burglary could be charged and convicted of burglary, wearing a disguise, and two separate counts of possessing a firearm during

commission of a felony. In other words, the current offenses multiply charges and convictions without necessarily increasing the available punishment for the offender (depending on the grade of the underlying felony). Subsection (e) proposes a more consistent approach: increasing maximum punishment available for any felony committed while wearing a disguise or body armor, but without exposing the defendant to additional overlapping charges.

Section 804(e)(1) does not include 11 Del. C. § 1239's term "disguise," which is not defined in the current criminal code, leaving it ambiguous exactly what the State has to prove. Instead, Subsection (e)(1) elaborates on what a disguise accomplishes by means of a requirement that the person wear a hood, mask, or other article "with intent to obscure the person's identifying features." This provides useful, functional elements that can account for any kind of disguise. Additionally, Subsection (e)(2) directly incorporates the definition of "body armor" from § 1449(e).

Section 804(f) provides certain limitations for the grade adjustments in Section 804, or for grade adjustments generally. Subsection (f)(1) ensures that the general grade adjustments in Section 804 are not "double counted" by denying the availability of the adjustment if the offense already takes into account the facts that must be proven to establish the adjustment. Subsection (f)(2)(A) provides a ceiling upon the grade adjustments in Subsections (b)–(e), as discussed in the Commentary to those Subsections. Subsection (f)(2)(B) provides a ceiling upon the application of all grade adjustments found throughout the Proposed Code. This has been added to prevent Class 2 felonies from being "bumped up" into Class 1 felonies, which would (according to the scheme set forth in Section 802) make those offenses eligible for capital punishment. Current Delaware law strictly reserves capital punishment for first-degree murder, and the Proposed Code carries that policy forward. Subsection (f)(3) makes clear that, as a general matter, only one upward grade adjustment may be applied to an offense. This applies both to the general grade adjustments in Section 804 and upward grade adjustments that appear in specific offense provisions. This limitation is necessary to prevent a single instance of criminal conduct from generating liability greatly disproportionate to that intended by the General Assembly. Yet, Subsection (f)(3) allows a specific offense provision to create an exception, allowing cumulative upward grade adjustments in particularly deserving cases.

Comment on Section 805. Valuation of Property for the Purposes of Grading

Corresponding Current Provision(s): 11 Del. C. §§ 224, 849(d), 855(c), 863, 931(6), 931(14), 939(g)–(h)

Comment:

Generally. This provision establishes a uniform method of calculating the value of property whenever that value determines the grade of an offense, such as theft or criminal damage.

Relation to current Delaware law. Section 805(a) and (b) set preferred valuation methods for different kinds of property. Those methods correspond to 11 Del. C. § 224. *Valuation of property*, though the language and structure of § 224 has been altered slightly for easier reading and application. The words "reproducing, or recovering" have been added to Subsection (a)(2) to account for valuation of intangible property, which is not easily replaced in the same way that tangible property might be. For example, data stored in computers that have been damaged

criminally under Section 2304 may be extremely valuable, but could not be replaced or given a readily ascertainable market value. Digital information is sometimes recoverable even once damaged, but data recovery itself can be an expensive service. Subsection (a)(2) allows the cost of that service to determine the grade of the offense. If digital information is not recoverable, Subsection (a)(2) would allow the value of the property to be decided by the cost of reproducing the information anew. That could be determined by the number of hours of work required, multiplied by the value of each hour of work. Note that this provision makes unnecessary 11 Del. C. § 849(d), which sets the method of valuing rented property for the purpose of theft.

Section 805(c) collects various default values of property found throughout the current code. Subsection (c)(1) directly corresponds to § 224(3). Subsections (c)(2) and (c)(3) directly correspond to § 939(g)–(h).

Section 805(d), allowing aggregation of the property values involved in thefts and related offenses "committed in a single scheme or continuous course of conduct" for the purpose of grading, directly corresponds to 11 Del. C. § 855(c).

Property Value as Element to be Proven. Note that once an offense is charged based upon valuation of property, the method of determining the property's value becomes a material allegation that must be proven by the State. *Keller v. State*, 425 A.2d 152, 155-56 (Del. 1981).

Comment on Section 806. Definitions

Corresponding Current Provision(s): 11 Del. C. §§ 863, 931, 1105(c), 1304(a)(2)

Comment:

Generally. This provision defines all key terms introduced in Chapter 800.

Relation to current Delaware law. Section 806(a) directly corresponds to 11 Del. C. § 931(6).

Section 806(b) directly corresponds to 11 Del. C. § 1304(a)(2).

Section 806(c) directly corresponds to 11 Del. C. § 931(14).

Section 806(d) directly corresponds to 11 Del. C. § 1304(a)(2).

Section 806(e), defining "vulnerable person," expands the definition of a "vulnerable adult" from 11 Del. C. § 1105(c), so as to include some persons less than 18 years of age, persons who are disabled, and persons who are 62 years of age or older. The former expansions upon § 1105(c) are taken from the grade adjustments in 11 Del. C. § 841(c) for persons who are impaired or disabled. The policy expressed in § 841(c) seems consistent with § 1105, so they were combined in this definition to apply in the general grade adjustment in Section 804(b). But, it is unclear why § 1105 specifically applies to adult victims, and not similarly situated child victims, so the proposed definition eliminates that distinction. The latter expansion for persons 62 years of age or older has been made because nearly every specific offense in the current code already aggravates grading for older victims. In this way, Section 804 provides more protection for older victims than current law by ensuring that a grade aggravation is available for all offenses, even new ones that may be added to the Code in the future. Yet, it seems indefensible to aggravate an offense against an older person who is just as healthy and capable as a person under 62 years of age. Adding older persons to the definition in Subsection (e)(1) requires

demonstration of some objective evidence of vulnerability due to age in order to take advantage of the grade adjustment.

Section 806(f) directly corresponds to 11 Del. C. § 863.

PART II: THE SPECIAL PART

OFFENSES AGAINST THE PERSON

CHAPTER 1100. HOMICIDE OFFENSES

Section 1101. Aggravated Murder
Section 1102. Murder
Section 1103. Manslaughter
Section 1104. Negligent Homicide
Section 1105. Causing or Aiding Suicide
Section 1106. Unlawful Abortion
Section 1107. Definitions
Section 1108. Procedures and Standards in Adjudication of Sentence for a Capital Offense

Comment on Section 1101. Aggravated Murder

Corresponding Current Provision(s): 11 Del. C. § 636; *see also* 1339, 4209A

Comment:

Generally. Section 1101 defines aggravated murder as intentionally causing the death of another person, or knowingly causing the death of police officers and emergency personnel in the line of duty, and grades these offenses as the most serious offense in the Proposed Code.

Relation to current Delaware law. Subsection 1101(a)(1) is substantively similar to 11 Del. C. § 636(a)(1), and retains the attending grade and procedures found in § 636(b), because the offense reflects the highest culpability level in the Code as to causing death of another person.

Subsection 1101(a)(2) corresponds to 11 Del. C. § 636(a)(4), with an important modification. Similarly to 11 Del. C. § 636(a)(4), it makes certain killings of police officers and emergency personnel in the line of duty Class 1 offenses, due to the specially condemnable nature of such conduct. But, 11 Del. C. § 636(a)(4) only requires "reckless" culpability in the commission of such killings. Because the offenses defined in Section 1101 are the most serious in the Proposed Code, eligible for the death penalty, a higher level of culpability is required to justify Class 1 grading. Therefore, Section 1101(a)(2) elevates the required culpability level to "knowing." Note, also that the Proposed Code still views reckless killings of police officers and emergency personnel more severely than ordinary manslaughter, grading them as Class 2 offenses (see Commentary on Section 1102 [Murder]).

Similarly, Section 1101 does not incorporate any of the alternative formulations of first-degree murder found in 11 Del. C. § 636(2)–(3) and (5)–(6). Current §§ 636(2) and (5)–(6) punish forms of reckless killing as first-degree murder, and are therefore eligible for the death penalty. Treating reckless action as equally morally blameworthy as a knowing or intentional action is an anomaly under current Delaware law, taken as a whole. The code's scheme of culpability is designed to reflect the judgment that different levels of culpability are deserving of different amounts of punishment. Yet, those situations are particularly condemnable and should be punished more harshly than ordinary manslaughter. To promote consistent application of the

principles present in the current code, § 636(5)–(6) have been moved to Section 1102, which treats them as second-degree murder. 11 Del. C. § 636(a)(2), a form of the traditional felony murder rule based on recklessly causing death, has not been included for the same reason. Delaware currently has two felony murder rules: recklessly causing death is punished as first-degree murder, while negligently causing death is punished as second-degree murder. Although causing death during commission of a felony is certainly blameworthy and deserving of punishment—hence the statutory aggravation the felony murder rule provides—reckless felony murder is currently eligible for the death penalty, like the other enumerated reckless killings. By not including § 636(a)(2), reckless and negligent felony murders will all be punished as murder. Note that this is still a substantial grade increase over manslaughter or negligent homicide. Note also that current Delaware law double counts § 636(a)(2)–(6) for the death penalty in its sentencing procedures. 11 Del. C. § 4209(e)(2) explicitly provides that a conviction under § 636(a)(2)–(6) automatically establishes an aggravating factor under the death penalty procedures. Because § 636(a)(2)–(6) have not been included in Section 1101 for the reasons already stated, however, this double counting is not an issue. Preserving the double counting would produce the irrational result of requiring no additional aggravating factor before the death penalty can be imposed for certain forms of manslaughter while requiring proof of an aggravating factor before imposing the death penalty for knowing and intentional murders.

Section 1101(b) combines the references to sentencing provisions in § 636(b)(1)–(2). Section 1108, as discussed below, is reserved to set forth the revised procedures in § 4209, retaining here the exclusion of the death penalty from offenders who are minors. But, the alternative provisions in § 4209A—setting a mandatory sentence of 25 years to life in prison for offenders who are minors—has not been retained. Section 802 already sets a minimum sentence of life imprisonment for Class 1 felonies.

Adulteration. 11 Del. C. § 1339 has not been included in Section 1101, or anywhere in Chapter 1100, for four reasons. First, its culpability requirement is too narrow. It only punishes intentional acts, whereas any culpable killing or injuring is punishable in Chapters 1100 and 1200. Second, if harm results from the adulteration, the offense is redundant with either murder or assault, but without increasing the punishment for those offenses. Third, if harm does not result from the adulteration, the punishment for the offense (a Class G felony) is far less than attempt liability for homicide or assault. Finally, it appears as though § 1339 has rarely, if ever, been used as the basis of prosecution, which calls its inherent usefulness into question.

Aiding Suicide. 11 Del. C. § 636(a)(3) is not included in Section 1101 because all offenses involving suicide are collected and defined together in Section 1105.

[Knowingly Causing Death. A footnote to Section 1101 proposes changing the culpability requirement for aggravated murder from “intentionally” to “knowingly.” If that were done, Section 1102(a)(1) would be eliminated, and the following Commentary would be added to apply to Section 1101(a): Section 1101 proposes lowering the culpability requirement as to causing death from “intentionally” to “knowingly.” “Knowing” culpability is underused in the current Delaware criminal code, which often distinguishes degrees of offenses based on the line between “intentional” and “reckless” conduct. But, most jurisdictions do not distinguish between intentional and knowing culpability for aggravated (or first-degree) murder. The reason for this is straightforward: the difference in blameworthiness between a person killing recklessly and knowingly is dramatic, whereas the difference between knowing and intentional is slight. Consider, for example, a defendant who blows up a building, knowing there is a person inside who will almost certainly be killed in the explosion. The defendant does not want or intend that

the person die; the defendant simply does not care. This defendant is not materially less blameworthy just because she does not subjectively desire the victim's death. On the other hand, recklessly causing death—blowing up the building while aware of a risk that a person is inside, but not knowing one way or the other—is materially less blameworthy. Under current Delaware law, a person who knew death was substantially certain to result from her act would be punished under manslaughter, not murder. Section 1101 fills this gap in deserved punishment.]

Comment on Section 1102. Murder

Corresponding Current Provision(s): 11 Del. C. § 635, 636; *see also* 634

Comment:

Generally. This provision defines and grades the offense of murder. Section 1102 imposes an intermediate punishment for offenses that, though considered less serious than aggravated murder, are considered more serious than the reckless killings covered by Section 1103.

Relation to current Delaware law. Section 1102 is substantially similar to the current provision for second-degree murder, 11 Del. C. § 635. Otherwise, Section 1102 reflects a number of proposed changes to current law. Subsection (a)(1) proposes to punish *knowingly* causing a person's death as murder, rather than manslaughter. Under current law, first degree murder requires the offender to intentionally cause death; manslaughter requires reckless causation; and second degree murder is only available as an aggravation from manslaughter or a mitigation from first degree murder. Without an explicit intermediate punishment between manslaughter and first degree murder, an offender who was practically certain her conduct would result in death receives punishment that would be appropriate for a person who was merely reckless. Subsection (a)(1) is proposed to ensure punishment that is equal to an offender's higher blameworthiness. Subsection (a)(2)(A) updates the language of § 635(1) to a simpler and more modern formulation, but is not intended to change the law's meaning. Subsection (a)(3) retains the felony murder rule of § 635(2), and is the only form of the felony murder rule proposed in Chapter 1100. Any deaths caused negligently or recklessly by a person in commission of another felony will be aggravated to murder. Subsection (a)(3) works two other minor changes. First, it inserts a direct reference to the inchoate offense of attempt in Section 701 for consistent application and interpretation of the law. Second, it specifies that conduct resulting in death is not automatically treated as a homicide by operation of the felony murder rule. The felony murder rule increases punishment for killing to account for two harms that are different in kind: the harm to the victim who dies, and the harm the underlying offense seeks to prevent or punish. Assault, reckless injuring, and homicide, however, punish varying degrees of one harm—physical injury. Applying the felony murder rule to underlying conduct causing death would not accomplish the rule's purpose, but simply circumvent the culpability requirement for murder. This follows Delaware's practice of only applying the felony murder rule to felonies causing a harm in addition to physical injury.

Subsection (a)(2)(B)–(D) ensures that the especially egregious reckless killings currently treated as first-degree murder in §§ 636(a)(4)–(6) will be treated as murder, without having to go through the analysis of Subsection (a)(2)(A) to determine extreme indifference to the value of human life. The reason for this addition is discussed in the Commentary to Section 1101, *supra*.

Note, however, that the latter part of § 636(a)(6) need not be included because escape in the second degree is already a felony, which brings it under the felony murder rule in Subsection (a)(3).

Section 1102(b) grades the offense as a Class 2 felony, and under the grading scheme in Section 802 the offense is subject to the same maximum and minimum terms of imprisonment as under current law.

Murder by Abuse or Neglect. Section 1102 does not incorporate 11 Del. C. § 634, which punishes the reckless killing of a child by abuse or neglect, or by a person who previously abused or neglected the victim. That provision is not necessary as a separate offense because the same result can be achieved through Section 1102. Occupying a position of responsibility for the care of a child under 14; abusing or neglecting that child to the point of death; and any patterns of behavior establishing a history of such abuse or neglect are powerful circumstances tending to show extreme indifference to the value of human life under Section 1102(a)(2)(A). Because §§ 634 and 635 are graded the same, it is not necessary to make special provision for § 634.

Comment on Section 1103. Manslaughter

Corresponding Current Provision(s): 11 Del. C. §§ 632, 641

Comment:

Generally. Section 1103 punishes two forms of manslaughter: recklessly causing the death of another person; and mitigation for murder, where an offender acted under the influence of an extreme disturbance. Although the influence of such a disturbance does not absolve all responsibility for the objectively harmful, and wrongful, act of killing another person, it is thought to reduce the offender's blameworthiness relative to those who commit murders unattributable to any such influence.

Relation to current Delaware law. Section 1103(a)(1) directly corresponds to 11 Del. C. § 632(1). Subsection (a)(2) directly corresponds to § 632(3), as will be discussed below. But, Section 1103 does not incorporate § 632(2), (4), or (5). 11 Del. C. § 632(2) dramatically increases the available punishment for an assault where the offender displays ordinary—not criminal—negligence as to resulting death. Ordinary negligence has been eliminated from the Proposed Code as an available culpability requirement, the reasons for which are explained in the Commentary to Section 205. Even if criminal negligence were substituted, however, including § 632(2) would destroy the distinction between manslaughter and negligent homicide by effectively punishing both offenses the same. 11 Del. C. § 632(4) has not been included. It punishes causing the death of a woman during an abortion. But, it fails to specify a required culpability as to causing death. Under both the current and Proposed codes, recklessness is read into the offense definition. Because recklessness is already required by Section 1103(a)(1)—and § 632(1)—this additional language accomplishes nothing new. 11 Del. C. § 632(5) is not incorporated because all provisions pertaining to suicide are collected in Section 1105.

Section 1103(a)(2) reflects the mitigation for murder due to extreme disturbance, found in § 632(3). Some of the requirements in § 641 are worked into the mitigation definition, while other provisions are reserved for Section 1103(b). The mitigation as it currently exists is materially preserved in Section 1103. The mitigation is altered, though, in two ways. First, Subsection (a)(1) expands application of the mitigation to both aggravated murder and murder,

rather than just to intentional or knowing killings. This change is necessary to avoid the anomalous and unintended result where a person suffering extreme disturbance is punished more harshly for a reckless or negligent killing than for an intentional or knowing killing. Second, an explicit reference to "mental" disturbance has been added to the "emotional" disturbances mentioned throughout current law. 11 Del. C. § 641, which expounds upon the disturbance mitigation in § 632, uses the terms "mental" and "emotional" seemingly interchangeably. This suggests that although only the latter term is used in § 632, both concepts are intended to fall under the mitigation. This policy makes sense because both cases produce the same effect—a less blameworthy homicide.

As previously mentioned, Section 1103(b) contains some of the provisions relating to mitigation currently found in § 641, including the provision excluding murderers who culpably cause the conditions that give rise to the mitigation. Yet, Subsection (b)(2) states § 641's exclusion more precisely. Because murder requires that the offender "knowingly" cause death, the appropriate culpability level for the exclusion is also "knowingly" causing the mitigating conditions. This wording is also more consistent with the rules applicable to excuse defenses found in proposed Section 401. Subsection (b) does not include § 641's provision regarding voluntary intoxication because all situations involving voluntary intoxication are governed by the General Part in Section 213.

Section 1103(c) preserves the current grade for manslaughter.

Mitigation for Attempted Murder. The mitigation in Section 1103(a)(2) is intended to apply equally to murders and attempted murders. Failing to apply it to attempted murder would produce an anomalous result that is not contemplated by current law. Because attempted murder is a more serious offense than manslaughter, an offender experiencing extreme disturbance would be punished more severely if the intended victim lives than if the victim dies. Section 1103(a)(2), in conjunction with Section 701's rules for attempt liability, avoids this anomaly by making it possible to be convicted of attempted manslaughter under the murder mitigation.

Comment on Section 1104. Negligent Homicide

Corresponding Current Provision(s): 11 Del. C. §§ 630A, 631, 633, 1448(e)(2); *see also* 630; 21 Del. C. § 4176A

Comment:

Generally. Section 1104 defines the offense of negligent homicide. Although criminal law generally considers recklessness the minimum culpability level for which liability is appropriate, Section 1104 departs from that usual standard. Section 1104 recognizes that the harm involved—the death of a human being—is more grave than that punished by other offenses. Note that the offense punishes criminal negligence, not ordinary or tort negligence. Section 205 eliminated ordinary negligence as a culpability requirement, and "negligence" in the Proposed Code has the same meaning as "criminal negligence" under current Delaware law.

Relation to current Delaware law. Section 1104(a) and (b)(2) directly correspond to 11 Del. C. §§ 631 and 633, respectively.

Section 1104(b)(1) corresponds to § 1448(e)(2), which increases punishment where the defendant caused death by use of a deadly weapon possessed in violation of proposed Section

5104. The minimum sentencing provisions have not been retained, because all minimum sentencing provisions in the Proposed Code are set forth in Section 802.

Subsection (b)(2) corresponds to the punishment of homicide by child abuse in § 633. No additional offense definition is necessary due to the overlapping culpability and result elements between § 633 and negligent homicide. Yet, the requirements of abuse or neglect of a child under 14 years of age are retained in this grading provision. The definitions of "abuse" and "neglect" are incorporated by reference to 10 Del. C. § 901. Section 1104 does not retain § 633's alternative formulation, that the cause of death need not have been abuse or neglect, so long as the offender previously engaged in a pattern of abuse or neglect. Current § 633 does not require that the offender have been previously convicted of that behavior to be guilty. This authorizes increased punishment based upon facts that have not been proven in court beyond a reasonable doubt. Punishment in those circumstances also disconnects the aggravating factor—abuse or neglect—from causing the necessary result of death. We could find no other offenses in the current code that punish an offender more harshly for unproven past behavior. Because this aspect of the offense is such a great inconsistency, it has not been retained. Finally, Section 1104 reduces the grade of § 633 by one level, as aggravating circumstances are used consistently throughout the Proposed Code to increase maximum punishment by only one grade.

Vehicular Homicide. 11 Del. C. §§ 630–30A have not been specifically retained in Section 1104 because the Proposed Code already covers the situations they address. 11 Del. C. § 630(a)(1) punishes causing death by criminally negligent driving as a Class D felony, which is identical to Section 1104. In that case, no additional offense is necessary. 11 Del. C. § 630(a)(2), however, punishes causing death by driving with ordinary negligence under the influence. As already discussed, ordinary negligence is not an available basis of criminal liability in the Proposed Code. Yet, Section 213 imputes reckless culpability upon a voluntarily intoxicated defendant who would have been aware of the risks he took had he been sober. In that case, someone who kills another person while driving under the influence will be liable for manslaughter—a two or three grade increase over the degrees of vehicular homicide. That is also the reason why § 630A need not be included in Chapter 1100. Sentencing provisions in §§ 630(c) and 630A(c) relating to prosecution of certain minors as adults have not been retained because any rules governing prosecution of minors as adults are addressed outside of the Proposed Code, in Title 10.

Operation of a Vehicle Causing Death. 21 Del. C. § 4176A has not been incorporated into Chapter 1100, and it is recommended that the offense be removed from Title 21. 21 Del. C. § 4176A punishes causing death while driving a motor vehicle. But, it imposes strict liability as to causing death whenever a driver is committing a moving violation under the Motor Vehicle Code. Although the offense is nominally called an unclassified misdemeanor, § 4176A authorizes up to 30 months' imprisonment—more time than a Class 8 felony, under the proposed grading scheme. The drafters could find no other strict liability offenses in current Delaware law that are punished as felonies. This is not surprising, because strict liability is usually reserved for minor regulatory offenses. Because this offense is such a great departure from the policies underlying current Delaware law, it has not been retained in Chapter 1100.

Note that imposing felony-level imprisonment under strict liability is a serious issue. Using the criminal law to punish acts without regard to culpability dilutes the moral credibility of the law, because it is wasted on something that is not truly blameworthy. If the law's credibility is impaired like that, its power to command public respect dwindles, and then cannot be brought to bear in situations where it is needed.

Comment on Section 1105. Causing or Aiding Suicide

Corresponding Current Provision(s): 11 Del. C. §§ 632(5), 636(a)(3), 645

Comment:

Generally. Section 1105 criminalizes causing or aiding a suicide. Although Chapter 1100 declines to recognize attempted suicide as an offense (homicide can only be committed against another person), Section 1105 recognizes there may be culpable involvement in another's suicide. Section 1105's offenses clarify the availability of homicide liability for causing another to commit suicide, and they allow for liability analogous to inchoate or accomplice liability where one aids another to commit suicide.

Relation to current Delaware law. Section 1105(a)–(b) corresponds to 11 Del. C. §§ 632(5) and 645, but with some slight changes. The offense is defined according to "aiding" suicide only, but creates a grading distinction where the victim does attempt or commit suicide. In either case, however, the culpability requirement has been lowered from "intentional" to "knowing" causation, in recognition of the negligible moral distinction between the two when it comes to ending human life. *See* Commentary to Section 1101. Yet, the maximum punishment for causing suicide in Subsection (b)(1), when compared to § 632(5), is two grades lower. This is in part due to the lessened culpability requirement, and partly due to the fact that, in the proposed grade provision, no proof of causation is required. It is difficult to define causation in suicide, when every case necessarily involves the intervening acts and freedom of choice of the one committing suicide. The case for causation is much clearer where the offender employs force, threats, or coercion—means calculated to override the victim's freedom of choice. In those cases, Subsection (c) equates causing suicide with homicide. Subsection (b)(2) punishes an offender one grade lower where the victim attempts suicide, but does not succeed, to account for the lesser resulting harm.

Additionally, Subsection (b)(3) retains the grade for aiding suicide in § 645. It punishes knowingly aiding a person to commit suicide, even if the suicide is never attempted. The purpose of the provision is to punish a person who has materially advanced the likelihood that a person would attempt suicide—for example, by providing the person with enough pills to end her life, and knowing that they would be used for that purpose—even if the suicide is never actually attempted. The discounted grade for "attempting to aid" suicide is the same grade that could be reached by applying the inchoate attempt offense in Section 701 to Section 1105(b)(2). Yet, this situation involves multiple layers of attempt conduct, given the third person's potential, intervening suicidal act, which could create confusion. To avoid ambiguity, Subsection (b)(3) makes explicit that liability still attaches to an attempt to aid suicide, which merely clarifies what current Delaware law already provides.

Section 1105(c) corresponds to 11 Del. C. § 636(a)(3), which made it an offense to intentionally cause another's suicide by force or duress. Use of force or duress could cause a suicide, however, even if the offender did not subjectively desire the suicide to occur. Because the grade for causing suicide short of force or duress is so much lower than murder, many culpable killings-through-suicide would be punished too leniently without acknowledging that a person could be prosecuted for murder, manslaughter, or negligent homicide in the proper circumstances. For consistency of those circumstances, the term "coercion" is substituted for

"duress" to maintain consistency within the Code, and incorporating by reference the definition of the coercion offense in Section 1404.

Comment on Section 1106. Unlawful Abortion

Corresponding Current Provision(s): 11 Del. C. §§ 651–54, 222(28); *see also* 24 Del. C. § 1790

Comment:

Generally. This provision criminalizes performing or choosing to submit to an abortion that is performed in violation of the subchapter of Title 24 governing lawful abortions. The offense is grouped with homicide offenses because abortion ends the biological functions of a human being, even if the definition of a "person" for the purpose of homicide does not include fetuses.

Relation to current Delaware law. Section 1106(a) directly corresponds to the offense definitions in 11 Del. C. §§ 651 and 652, combining their common elements and reserving their differences for grading in Subsection (d). Subsection (a)(2) is intended to accomplish the purpose of the current law more precisely. The previous offenses relied on definitions of "miscarriage" and "abortion" to define the end of a pregnancy; however, "abortion" was defined in § 654 by a "miscarriage," and "miscarriage" inaccurately conveys behavior the offense intends to prohibit. In common usage, a miscarriage is the termination of a pregnancy due to the death of a fetus before its viability outside the womb, while such termination after viability is commonly called a stillbirth. On their face, then, §§ 651–52 appear to only prohibit unlawful abortions performed pre-viability. A careful reading of 24 Del. C. § 1790, however, reveals that nearly every abortion performed after viability is prohibited in Delaware. Therefore, Section 1106(a)(2) has replaced use of the term "miscarriage".

Section 1106(b) preserves the offense in § 653 for issuing abortional articles as it is.

Section 1106(c) preserves the grades of the offenses in §§ 651–53.

Comment on Section 1107. Definitions

Corresponding Current Provision(s): 11 Del. C. § 654

Comment:

Generally. This Section provides definitions of key terms used in this Chapter.

Relation to current Delaware law. Section 1107(a) provides a substitute definition of "abortion" instead of the current one in 11 Del. C. § 654, mainly because of that definition's dependence on the term "miscarriage," which is not defined and the common use of which—as discussed in the Comment on Section 1106—appears inaccurate. The new definition covers the same relevant behavior due to its focus on intent, rather than result.

Section 1107(b) provides definitions of "attempt" and "attempting" that will be used throughout the Code by reference to the inchoate offense in Section 701.

Section 1107(c) defines "coercion" by reference to the offense definition in Section 1404.

Section 1107(d) adds a simple definition for "suicide," which current law does not define. The definition is important, however, because it requires that the one committing suicide do so intentionally.

Comment on Section 1108. Procedures and Standards in Adjudication of Sentence for a Capital Offense

Corresponding Current Provision(s): 11 Del. C. § 4209

Comment:

Generally. This provision sets forth procedures and standards of adjudication for imposition of punishment by death for aggravated murders.

Relation to current Delaware law. [This Section is reserved, awaiting action by the General Assembly, if any, in the wake of *Rauf v. State*, No. 39, 2016, 2016 WL 4224252 (Del. Aug. 2, 2016).]

CHAPTER 1200. ROBBERY, ASSAULT, ENDANGERMENT, AND THREAT OFFENSES

Section 1201. Robbery and Carjacking
Section 1202. Assault
Section 1203. Reckless Injuring
Section 1204. Reckless Endangerment
Section 1205. Operating a Vehicle While Under the Influence of Drugs or Alcohol
Section 1206. Genital Mutilation of a Female Minor
Section 1207. Terroristic Threats and Hoaxes
Section 1208. Unlawfully Administering Drugs
Section 1209. Reckless Infliction of Mental or Emotional Harm
Section 1210. Definitions

General Comment Regarding Chapter 1200.

Corresponding Current Provision(s): 11 Del. C. §§ 614, 1327

Comment:

Two current offenses are not retained in Chapter 1200: 11 Del. C. § 614, which prohibits abuse of a sports official, and 11 Del. C. § 1327, which prohibits maintaining a dangerous animal.

Abuse of a Sports Official. Chapter 1200 does not retain 11 Del. C. § 614, which aggravates grading for other offenses that already exist, such as reckless endangering, assault, terroristic threatening, and criminal mischief, when the offenses are committed upon a sports official. Although Section 1202(b)(4) [Assault] contains a grade adjustment for special victims that could include be written to include sports officials, the status of those victims justifies the whole grade increase for reasons that do not apply to sports officials. The victims in Section 1202(b)(4) are police, firefighters, emergency personnel, or correctional officers victimized in the line of duty—generally, persons engaged in a vital public service that the assault hinders, thus increasing the assault's harm to society. Sports officials may be victims of aggression more frequently than other citizens, so it does make sense to take their vulnerability into account. As such, it would be appropriate to add a SENTAC Sentencing Guideline that increases the sentence an offender will receive when sports officials are victims, but without doubling the maximum available punishment.

Maintaining a Dangerous Animal. Chapter 1200 does not retain 11 Del. C. § 1327, which prohibits maintaining a dangerous animal that causes death or physical injury to another person or animal. Although the current offense includes a detailed and very broad definition of what constitutes a "dangerous animal," in reality the offense is merely a specific form of recklessness resulting in property damage, injury or death, that are caused by an animal rather than by a person. The reckless causation of such harm should be treated similarly, regardless the instrumentality through which it was caused. Current § 1327 also includes specific provisions about how to prove causation and culpability for the offense, but those issues are present in every offense and do not need to be specifically stated. Instead, as in all other cases, courts can resolve issues of causation and culpability according to generally applicable principles in cases where death or serious injury is caused by the failure of an owner to control his or her animal. The

grading of § 1327 is also inconsistent with the rest of the Proposed Code. Specifically, the offense is graded lower than manslaughter, roughly equivalent to reckless injuring, and incompatible with property damage offenses – as it does not take into account the value of the damage done to the property. Accordingly, it makes more sense to give § 1327 effect through the homicide, reckless injuring, and property offenses in Chapters 1100,1200, and 2300 rather than retaining it as a separate offense.

Comment on Section 1201. Robbery and Carjacking

Corresponding Current Provision(s): 11 Del. C. §§ 831, 832, 835, 836

Comment:

Generally. Section 1201 defines and grades the offenses of robbery and carjacking.

Relation to current Delaware law. Section 1201(a) creates a broad offense definition for both robbery and carjacking by combining the essential elements of 11 Del. C. §§ 831(a), 832(a), 835(a), and 836(a) (first and second degree robbery and first and second degree carjacking) using more generalized language. To unify the definitions of robbery and carjacking, Section 1201(a) makes some minor changes to the corresponding current offenses. First, the offense definition in Section 1201(a) disconnects the offense from theft and, instead, describes the offense conduct as taking of property while in close proximity to the victim. This change reflects the idea that the offense of robbery should involve some additional danger other than theft. Second, the offense definition in Section 1201(a) simplifies the intent requirement of § 831(a)(1) so that the State no longer needs to prove the defendant's intent to permanently deprive the victim of the property, or intent to overcome resistance to the taking. As noted above, this change unifies the definition of robbery with that of carjacking, which does not require a particular showing of intent as to the victim's property. Note that these changes make the provisions in §§ 835(c) and 836(c) unnecessary; the offense no longer focuses on the offender's possession or control of vehicle taken or his intent regarding the victim's property—just the taking itself. Third, Section 1201(a)(2) retains the requirement in § 831(a) that the offender use force or a threat of force in carrying out the taking, but no longer requires that the threat be of the "immediate use of force." Threats of future harm can be as coercive as threats of immediate harm.

Section 1201(b) grades the various forms of robbery and carjacking. Subsection (b)(1) grades carjacking, corresponding to §§ 835 and 836. Note that Subsection (b)(1) defines the term "motor vehicle" within its description of carjacking and the term is also defined separately in Chapter 21, meaning that the definition provision in 11 Del. C. § 837(b) is no longer necessary. Subsection (b)(1)(A) preserves the grade aggravation in § 836(a)(6) to a Class 4 felony where an occupant or passenger of the vehicle is fourteen years of age or younger. But, Subsection (b)(1)(A) eliminates the grade adjustment in § 836(a)(6) where an occupant or passenger of the vehicle is over sixty two years old because the general grade adjustment in Section 804 covers this situation. Subsection (b)(1)(B) preserves the grades for carjacking committed under the conditions set forth in § 836(a)(1)-(3). Subsection (b)(1)(C) preserves the grade for carjacking committed under the conditions set forth in § 835(b)(2). Subsection (b)(1)(D), corresponding to 11 Del. C. § 835(b)(1), provides a default grade for all carjackings that do not have the aggravating circumstances listed in Subsection (b)(1)(A)–(C).

Subsection (b)(2) grades aggravated robbery, corresponding to 11 Del. C. §§ 832(a)(1)-(3) and 836(a)(4)-(5). Note that despite the presence of a separate carjacking grading scheme in Subsection (b)(1), the aggravated robbery and robbery grading schemes in Subsections (b)(2)-(3) still apply to the taking of vehicles, if the taking was done in a manner described by those Subsections. The grading schemes are different because Subsection (b)(1) *only* applies to the taking of vehicles and does not require any aggravating factor such as physical injury or the use of a weapon, while Subsections (b)(2)-(3) apply to the taking of any property and require such an aggravating factor. Thus, a prosecutor handling a carjacking in which a deadly weapon was used would be able to apply either the carjacking or the aggravated robbery grading scheme. Subsection (b)(2)(A) preserves the grade of the offense conduct set forth in §§ 832(a)(1) and 836(a)(5). Subsections (b)(2)(B)-(C) preserve the grades of the offense conduct in §§ 832(a)(2) and 836(a)(4).

Subsection (b)(3) grades all remaining forms of robbery, corresponding to 11 Del. C. § 831(a) (second degree robbery).

Special Provisions in 11 Del. C. §§ 835(d) and 836(d)-(f) Not Retained. First, Section 1201 does not include the provisions in 11 Del. C. §§ 835(d) and 836(f) relating to related or lesser offenses because the structure of the proposed offenses is such that a person can only be convicted of robbery or carjacking—not both. Second, Section 1201 does not include the provision in § 836(d) relating to an offender's lack of knowledge as to the age of his or her victim because knowledge as to age is dealt with by the mistake provisions in Section 206 of the General Part. Finally, Section 1201 does not include the provision in § 836(e) for strict liability as to causing physical injury during carjacking. This provision would be an anomaly if included in the Proposed Code, because the current code requires culpability to be proven in all other cases involving physical injury.

Comment on Section 1202. Assault

Corresponding Current Provision(s): 11 Del. C. §§ 601, 606, 607, 611, 612, 613, 1103, 1103B, 1114, 1114A, 1254, 1339; 7 Del. C. § 6013(c)-(e)

Comment:

Generally. This provision defines and grades the offense of assault. Cases involving threats to commit assault are covered by Section 1207's offense for terroristic threats. Cases involving reckless and negligent injuring, which are treated as assaults in the current code, are treated separately in Section 1203.

Relation to current Delaware law. Section 1202(a) defines the offense of assault. Subsection (a)(1) combines the essential elements of 11 Del. C. §§ 607 (strangulation), 611(1), 612(a), and 613(a) (first, second, and third degrees of assault). The variety of types of assault in current law are dealt with in this Section by variations in grading, rather than by changing the offense definition. Subsection (a)(1) also covers 11 Del. C. § 1339 (adulteration) but makes some changes to this offense. First, Subsection (a)(1) only incorporates the offense conduct in § 1339 to the extent the adulteration causes physical injury; it does not cover adulteration causing death. The offense of adulterating a substance with intent to cause death is better addressed by the homicide provisions in Chapter 1100. Grading changes related to this Subsection are discussed

below. Second, in incorporating § 1339 into the proposed grading scheme of Section 1202, the grade of the offenses ends up being reduced one grade. The grades of the current offense and proposed offense are too similar to justify a grading adjustment for using adulteration as the means of assault. Consolidating these offenses improves the Code's simplicity. There is no reason to retain separate provisions for different means of assault when the culpability and result requirements are the same. Subsection (a)(2) corresponds with 11 Del. C. § 601 (offensive touching), but simplifies the offense definition by removing the distinction between offensive touching generally and touching with bodily excretions.

Section 1202(b) grades the various forms of assault. Subsection (b)(1) describes circumstances under which the offense will be graded as "enhanced aggravated assault," corresponding to 11 Del. C. §§ 613(a)(2) & (a)(4) and 1103B. Note that, although not explicitly stated, Subsection (b)(1)(B) incorporates the offense conduct in 11 Del. C. § 606 (first degree abuse of a pregnant female), because, as it is defined in the Code, "serious physical injury" includes nonconsensual termination of pregnancy. Subsection (b)(1)(C) corresponds to § 1103B (first degree child abuse) and preserves the grade. Note that the terms "abuse of a child" and "neglect of a child" are defined in Section 1210, incorporating by reference the definitions provided in 10 Del. C. § 901(1).

Section 1202(b)(2) describes the circumstances under which the offense will be graded as an "aggravated assault," corresponding to 11 Del. C. § 612(a)(1) and (a)(9), and § 613(a)(1). Subsection (b)(2)(A) sets a higher grade where the offense involves use of a firearm or deadly weapon, corresponding to 11 Del. C. §§ 607(a)(3)a. and 613(a)(1). Note that, as a result of consolidating these independently aggravated forms of assault in current law, the maximum punishment for aggravated strangulation is increased. Note also that aggravated strangulation for causing serious physical injury under § 607(a)(3)b. is covered by Subsection (b)(2)(B)(i), which has the same maximum punishment.

Subsection (b)(2)(B)(i) covers 7 Del. C. § 6013(c)-(e), which relates to environmental control. Subsection (b)(2)(B)(i) adequately covers the offenses defined in § 6013(c)-(e) for three reasons. First, although the offenses in § 6013(c)-(e) arguably do not have a culpability requirement as to causing injury and as a result recklessness is read in, some violators of § 6013, because of their relative sophistication, are likely to know with practical certainty that their conduct will cause injury. Such knowledge is sufficient to show "knowing" culpability under proposed Section 205 and current Delaware law.[9] Therefore, the current offenses in § 6013(c)-(e) are appropriately defined in the Proposed Code with a "knowing" culpability requirement (and graded as a Class 6 felony). Of course, insofar as some offenders are merely reckless with regard to causing serious physical injury, they may still be prosecuted for a Class 7 felony under Section 1203(b)(1)(B) [Reckless Injuring]. Second, the "serious harm to the environment" result contemplated by § 6013 (c)-(e) necessarily incorporates serious physical injury to a person, whether that harm is past or prospective, so it is appropriate to define it as causing serious physical injury. Finally, the grade of § 6013(c)-(e) is already identical to the grade in Subsection (b)(2)(A). [Note that the offenses in § 6013(c)-(e) only work within the scheme of Section 1202 if the culpability requirement for assault is changed from "intentional" to "knowing," as proposed in the footnote to Section 1202(a). If "intentional" culpability is retained, changes may need to be made to the Proposed Code in order to accommodate § 6013(c)-(e) in a different way.].

[9] *See* 11 Del. C. § 231(c)(2).

Section 1202(b)(3)(A)(ii) corresponds to 11 Del. C. § 611(1), grading simple assault. Subsection (b)(3)(A)(i) sets a higher grade, however, for assaults committed in particular ways. Subsection (b)(3)(A)(i)(aa) grades offenses committed by means of a firearm or other deadly weapon, corresponding to 11 Del. C. § 612(a)(2). Subsection (b)(3)(A)(i)(bb) grades assaults committed by strangulation, corresponding to 11 Del. C. § 607(a)(2). Subsection (b)(3)(B) grades an assault by offensive touching, corresponding to both forms of the current offense in 11 Del. C. § 601.

Section 1202(b)(4) converts some repeated, specialized offense definitions found throughout the current assault provisions—all of which deal with similar classes of special victims—into a broadly applicable grade adjustment for assault and aggravated assault. Subsections (b)(4)(A)-(C) correspond to the following current provisions: 11 Del. C. §§ 601(c); 612(a)(3), (4), (5), and (11); and 613(a)(5) and (6). Subsection (b)(4)(D) corresponds to § 612(a)(10). Subsection (b)(4)(E) corresponds with 11 Del. C. § 1254 (assault in a detention facility), with some minor changes. First, Subsection (b)(4)(E) retains the one-level grade increase for assault done in a detention facility, but because assault is a Class 8 felony under Section 1202(b)(3)(A)(ii) and this one grade adjustment results in a Class 7 felony, the grade of assault done in a detention facility is one level lower than current § 1254's Class D felony grade. The change results from the Proposed Code's general policy of providing one grade increase per aggravating factor, absent a compelling justification for a greater increase. Providing a two-level grade increase for assault done in a detention facility (which is a four-fold increase in available punishment), while only providing a one-level grade increase for offenses involving police officers and emergency personnel who are victimized in the line of duty is disproportional and unjustified. Second, Subsection (b)(4)(E) does not account for the mandatory minimum sentencing provision in § 1254. All minimum sentencing provisions in the Proposed Code are set forth in Section 802.

Note that the higher grades for victims 62 years of age or older, found in §§ 612(a)(6) and 613(a)(7), are not retained. An enormous number of current specific offenses contain such grading provisions. As a result, a generally applicable grade adjustment has been added to the General Part in Section 804 to deal with these situations.

Assaults Involving a Disabling Spray during a Commission of a Crime. 11 Del. C. § 612(a)(8) provides that using disabling chemical sprays or similar means during a commission of a crime amounts to assault in the second degree. This provison is both too narrow (addressing a very specific means for assault), and too broad (applying to assault during a commission of any crime). Moreover, unlike most other assault provisions, its lacks a result element (such as physical injury). The combination of these factors leads to incoherent consequences under current law. For instance, both a person that during a commission of a misdemeanor uses pepper spray *withouth* causing physical injury (§ 612(a)(8)), and a person using a firearm *and* causing a physical injury (§ 612(a)(2)), would be guilty of a Class D felony. This result is inconsistent with general principles of criminal liability and perversely disincentivizes the use of non-lethal means such as disabling sprays. For these reasons, § 612(a)(8) is not retained. Note, however, that Section 1202(b)(1)(B) provides an enhanced grading for assaults causing serious physical injury during a commission of a felony.

Strict Liability as to Knowing Victim's Age or Pregnancy. 11 Del. C. §§ 612(a)(10), (b)-(c) and 613(b), which impose strict liability as to knowledge of a victim's age or status as a pregnant woman, are not retained in Section 1202. General principles of criminal liability exemplified throughout the current Delaware Code counsel that prosecution for all but the most

minor infractions requires some showing of culpability. Therefore, issues such as mistake as to age are governed by general mistake provisions in Section 206.

Body-Piercing and Tongue-Splitting Offenses Not Retained. Generally, proposed Section 1202 does not retain 11 Del. C. § 1114 (body piercing) or 11 Del. C. § 1114A (tongue-splitting) because these offenses are given effect through a combination of the general assault offense in Section 1202 and General Part provisions relating to consent in Section 208. The act criminalized by § 1114 is essentially standard assault, but sets forth certain situations where consent is not effective. A combination of the proposed Section 1202 and Section 208 of the General Part will adequately cover these situations because Section 208 accounts for situations where consent is ineffective due to youth or intoxication. The same is true for § 1114A(b) (tongue-splitting). § 1114A(a), however, is different because it is a regulatory offense, dealing with situations where the person performing the act is not a doctor or dentist. Proposed Section 1202 will not include § 1114A(a) because it is unnecessary. The definition of consent in the General Part is broad enough to provide that a person could not consent to a surgical procedure unless it is given to person who is licensed to perform it. With respect to both §§ 1114 and 1114A, the proposed Section 1202 will not retain the fake identification or mistake as to age provisions, because both of those situations are governed by the General Part as well, in Section 206.

Assaults Involving Use of Weapons. Some forms of assault in Section 1202 are graded more harshly if they involve the use of firearms or deadly weapons. Note that there is a separate offense for possession of a firearm during commission of a felony in proposed Section 5101, and that both 11 Del. C. § 206 and proposed Section 210 would prevent a defendant from being convicted of both that offense and an assault under either Section 1202(b)(2)(A) or (b)(3)(A)(i).

Comment on Section 1203. Reckless Injuring

Corresponding Current Provision(s): 11 Del. C. §§ 603, 604, 605, 611, 612, 628, 628A, 629, 1100(9), 1103, 1103A, 1103B, 1104, 1448; *see also* 2 Del. C. § 309 and 21 Del. C. § 4134

Comment:

Generally. Section 1203 defines and grades the offense of reckless injuring. Section 1203(a) criminalizes causing physical injury, while Section 1203(b) grades the offense as anything from a Class B misdemeanor to a Class 5 felony, depending on the extent of a victim's injuries and the defendant's culpability.

Relation to current Delaware law. Section 1203(a) is substantially similar to the current offense definitions in 11 Del. C. §§ 603(a)(1) and 604. Those offenses deal with reckless *endangerment*, not injury. But, in current law, assaults are defined to include reckless conduct. This offense has been created to make a distinction in punishment between recklessly and knowingly causing injury—a substantial difference in blameworthiness.

Section 1203(b) grades reckless injuring, which, as mentioned above, is currently treated as equal to intentional assaults in 11 Del. C. §§ 611(1) and 612(a)(1), and intentional child abuse or neglect in 11 Del. C. § 1103B. Subsection (b)(1) grades the offense involving serious physical injury and varies the grade depending on whether specific conditions are met. Subsection

(b)(1)(A)(i) corresponds with the reckless form of § 1103B (first degree child abuse); but, the grade has been reduced one level to reflect the difference in severity between reckless injury and knowing injury in Section 1202. Subsection (b)(1)(A)(ii) corresponds with 11 Del. C. § 605 (second degree abuse of a pregnant female); but, the proposed Subsection does not require that the attack of the pregnant woman take place during the commission or attempted commission of or flight from another felony. An attack on a pregnant woman is equally worthy of punishment whether or not the attack was committed in conjunction with another felony. Subsection (b)(1)(B) grades any other form of reckless injuring causing serious physical injury as a Class 7 felony.

Section 1203(b)(2) grades the offense involving non-serious physical injury. Subsection (b)(2)(A)(i) corresponds with the reckless form of 11 Del. C. § 1103A (second degree child abuse), but makes a few changes. First, the proposed Subsection changes the age threshold in § 1103A(a)(1) from three years of age or younger to less than four years of age to maintain a consistent way of expressing age ranges in the Proposed Code. Additionally, the proposed Subsection is given a different letter grade based on the proposed grading scheme, which no longer includes Class G felonies; [the maximum sentence, however, remains the same]. Subsection (b)(2)(A)(ii) also incorporates the definition of "significant intellectual developmental disabilities" in 11 Del. C. § 1100(9). Subsection (b)(2)(A)(iii) corresponds to 11 Del. C. § 612(a)(2), but reduces the grade of the offense to reflect the distinction in blameworthiness between recklessness and knowledge or intent. Subsection (b)(2)(B) grades any other form of reckless injuring causing physical injury as a Class B misdemeanor, corresponding with 11 Del. C. §§ 611(1) and 1103 (third degree child abuse); but, the grade of the offense has been reduced to reflect the distinction between reckless and knowing or intentional injury.

Note that 11 Del. C. § 629, vehicular assault in the first degree, is effectively subsumed by Section 1203, despite using the lower culpability of ordinary negligence. On one hand, this Code proposes to eliminate ordinary negligence as a culpable state of mind that can support criminal liability. *See* proposed Section 205(b) and corresponding Commentary. On the other hand, Section 212(b) imputes the culpability of recklessness to a voluntarily intoxicated defendant. Therefore, any case where a person driving under the influence causes physical injury, the defendant would be considered at least reckless. This makes § 629 unnecessary, because the offense would automatically be treated as reckless injuring under proposed Section 1203.

Negligent Injuring. Current Delaware law contains a few specialized offenses that punish negligently causing injury. Punishing negligent injury in a selective manner provides disproportionate punishment of a subset of defendants who are not even aware of a risk that their conduct would cause injury. Negligent injury should either become a general offense, to avoid this disproportional, irrational selectivity, or it should not be a basis of liability at all. Section 1203 does not include those special cases because negligence is a slight culpability when dealing with a significant offense like causing serious or non-serious physical injury. If a general negligent injury offense were to be added to Section 1203, its text would follow the footnote to Section 1203(b). The following Commentary would apply to that language, if added: [Section 1203(b)(2) pulls together some diverse provisions criminalizing negligent injuring. Subsection (b)(2)(A) corresponds to 11 Del. C. § 1448(e)(2), which increases punishment where the defendant caused serious physical injury by use of a firearm possessed in violation of proposed Section 5104. The minimum sentencing provisions have not been retained, because all minimum sentencing provisions in the Proposed Code are set forth in Section 802. The grade of the offense

in Subsection (b)(2)(A) has been reduced to reflect the distinction in blameworthiness between causing death and causing serious physical injury, which the current provision does not make. Class 7 felony was used because, just as Class 4 felony is two grades higher than the default grade for negligently causing death in Section 1104(b)(3), Class 7 felony is two grades higher than the default grade for negligently causing serious physical injury in Section 1203(b)(2)(B)(ii). Subsections (b)(2)(B)(i)-(ii) correspond to 11 Del. C. §§ 611(2) and 628A (second degree vehicular assault). But, § 628A(1), which punishes causing serious physical injury through negligent driving, has been expanded by Subsection (b)(2)(A)(ii) to punish injuring by any means. Subsection (b)(2)(C) expands upon 11 Del. C. § 628 (third degree vehicular assault) in the same manner. Note that driving under the influence does not need to be dealt with under negligent injuring in Section 1203(b)(2) because reckless culpability will automatically be imputed under Section 213 for any offense involving voluntary intoxication.]

Regulatory Offenses Generally Incorporated. Section 1203 generally covers two offenses currently codified in regulatory titles. First, through its offenses of reckless and negligent injuring, Section 1203 covers 21 Del. C. § 4134 (operation of vehicles on approach of authorized emergency vehicles). The offense defined in § 4134 makes it a crime for a person to hit an emergency responder with his or her vehicle as a result of not following designated traffic rules. The grade of the offense, which is currently a Class F felony in all cases, will become more nuanced, depending on whether the resulting injury was serious and whether it was created recklessly or negligently.

Second, through reckless endangerment and injuring offenses, Sections 1203 and 1204 together cover 2 Del. C. § 309 (dangerous flying). The offense defined in § 309 essentially amounts to reckless endangerment and, accordingly, it can be incorporated into the Section dealing with all other reckless endangerment offenses. Note that, by incorporating § 309 into the proposed Section 1203, heavier punishments than those provided in § 309 may accompany a conviction for the offense. Under Sections 1203 and 1204, the level of punishment authorized will depend on the nature of the risk involved and whether injury is actually caused by the offender's reckless behavior.

Comment on Section 1204. Reckless Endangerment

Corresponding Current Provision(s): 7 Del. C. § 6309; 11 Del. C. §§ 603, 604, 613(a)(3), 1104, 1322; *see also* § 1107

Comment:

Generally. Section 1204 defines and grades the offense of reckless endangerment. Section 1204(a) criminalizes creating a risk of bodily harm to another person, even if the harm does not result.

Relation to current Delaware law. Section 1204(a) is substantially similar to the current offense definitions in 11 Del. C. §§ 603(a)(1) and 604 (reckless endangerment).

Section 1204(b) directly corresponds to 11 Del. C. §§ 603 and 604; but, the grade for Subsection (b)(1) has been reduced to reflect the lack of resulting harm. Note that Subsection (b)(1) also covers 7 Del. C. § 6309(i) (hazardous waste), which makes it a crime to knowingly create a risk of death or serious physical injury by transporting, treating, storing, or disposing hazardous waste in an unsafe way. Subsection (b)(1) does not need to make reference to the

specific acts enumerated in § 6039(i) to fully account for the offense conduct because the manner in which someone creates a danger of death or serious physical injury is immaterial. The resulting harm is the crux of a reckless endangerment offense. One notable difference between Subsection (b)(1) and § 6309(i) is the grading. Subsection (b)(1) grades the offense one level lower than § 6309(i). This grade reduction is justified because there is no basis for aggravating reckless endangerment solely based on the manner in which it is caused. Endangerment offenses do not deal with resulting harm, only with the creation of a risk of harm, and the grading of endangerment offenses already takes into account the severity of the risked harm, if the manner of endangerment is relevant to the degree of harm that is risked. Note, however, that if the endangerment caused by the unlawful disposal of hazardous materials is particularly egregious because of the number of people it impacts, Section 2305 (causing/risking catastrophe) will apply to increase the grade attached to this offense conduct. Finally, note that the offenses in 7 Del. C. § 6309(f)-(g) are not incorporated into the proposed Subsection (b)(1) because they are regulatory offenses that only give rise to misdemeanor level punishment. These offenses will still be retained in Title 7.

Section 1204(b)(2) grades reckless endangerment as a Class B misdemeanor in all cases not involving a substantial risk of death [or serious physical injury]. This covers 11 Del. C. § 1322(1) (criminal nuisance) because the offense defined in § 1322(1) (recklessly creating a condition which endangers the safety or health of others) is practically identical to the offense of reckless endangerment defined in Section 1204(a) (recklessly creating a substantial risk of physical injury to others). 11 Del. C. § 1322(1) is graded in the current code as an unclassified misdemeanor.

Section 1204(c) directly corresponds to 11 Del. C. § 1104, providing a defense to a prosecution under Section 1204(a) where the accused is a member of an organized religion and attempts to treat a child by prayer in accordance with the tenets of that religion. Note that the current offense that § 1104 applies to, 11 Del. C. § 1102 (endangering the welfare of a child) has not been retained in the Proposed Code. For a discussion of those reasons, see the General Commentary to Chapter 4400. The situations to which § 1104 applies would, under the Proposed Code, be prosecuted as reckless endangerment rather than endangering the welfare of a child. Therefore, the defense in § 1104 has been included here.

Negligent Endangerment Not Included. Two current offenses punishing negligent endangerment have not been included in Section 1204. First, 11 Del. C. § 603(a)(2), punishing negligent endangerment involving possession of firearms, has not been included. Second, 11 Del. C. § 1107, punishing negligent endangerment of children, has not been included. It is unusual to punish negligent injuring due to the relatively relaxed culpability requirement. For that reason, negligence cannot support a charge of endangerment without resulting injury. The situations contemplated by § 603(a)(2) and § 1107 are too specific to support a change to the current code's broad policies against punishing negligent behavior except in exceptional circumstances the justify doing so.

Reckless Endangerment Resulting in Serious Physical Injury. 11 Del. C. § 613(a)(3) combines reckless endangerment and serious reckless injuring into an additional, aggravated offense that is treated as a form of first-degree assault. This form of assault is not specifically retained in Chapter 1200, because it violates a general assumption of criminal law, which is that culpability as to the manner or extent of harm is immaterial; only culpability as to causing harm is relevant. Yet, because reckless injuring and endangerment are separate offenses under Sections

1203 and 1204, both offenses could be charged based on the same conduct in the proper circumstances.

Comment on Section 1205. Operating a Vehicle While Under the Influence of Drugs or Alcohol

Corresponding Current Provision(s): 21 Del. C. § 4177; 23 Del. C. §§ 2302, 2305

Comment:

Generally. Section 1205 provides an offense for operating a boat, airplane, or motor vehicle while under the influence of alcohol or drugs.

Relation to current Delaware Law. Section 1205(a) defines the offense of operating a vehicle while chemically impaired. Section 1205(a) combines essential elements of the offense definitions in 21 Del. C. § 4177(a) (driving a vehicle while under the influence or with prohibited alcohol or drug content) and 23 Del. C. § 2302(a) (operation of a vessel or boat while under the influence). Note, however, that Section 1205 is not intended to replace those regulatory provisions altogether. Section 1205 is meant to only replace the portions of those provisions that define a criminal offense. "DUI" is an important area of criminal law practice in Delaware. As a matter of fair notice to the public of what conduct is prohibited, it is preferable that this offense definition appear in the criminal Code rather than regulatory titles, because it is invoked so frequently. All the purely civil, procedural, or regulatory features of 21 Del. C. § 4177 and 23 Del. C. § 2302 should remains where they are—along with any additional punishments and consequences of conviction aside from imprisonment—to be read in conjunction with Section 1205.

Section 1205(b) grades the offense as a Class B misdemeanor, which is one grade lower than current 21 Del. C. § 4177 and 23 Del. C. § 2305. The grade has been lowered one level to be consistent with the relative blameworthiness where injury does not result. The offense in Section 1205 does not require that the offender cause physical injury to another through his or her actions—or even endanger the life or property of another person—and, accordingly, cannot be graded as harshly as an offense that does. As a general matter, the current code always punishes causing injury more seriously than merely risking injury, and treats the former as more blameworthy conduct. Note that the addition of Section 1205 to Chapter 1200 does not prevent the State from instead prosecuting an offender under Section 1203 (reckless injuring) or Section 1204 (reckless endangerment) when that offender operates a vehicle while chemically impaired and does cause physical injury to or endanger another person.

Section 1205(c) cross-references to 21 Del. C. § 4177 to ensure the two Sections are read together, maintaining continuity with current practice as much as possible. Additional provisions in § 4177 for any person convicted under Section 1205(a) include drug treatment programs, suspended sentences, and ignition interlock installation, among others. Although the additional consequences provided for in § 4177 currently only apply to the offense of operating a motor vehicle while under the influence, in the proposed Section 1205 they apply to the operation of a boat, airplane, or motor vehicle while under the influence. Operation of any vehicle while under the influence is especially dangerous, and people similarly situated should be subject to the same treatment and consequences.

Section 1205(d), providing a defense for a person who is chemically impaired due to taking a drug in accordance with an authorized prescription, corresponds to 21 Del. C. § 4177(a)(3)b. Note that 21 Del. C. § 4177(b)(1)–(b)(3)a., through framed as defenses, actually describe factual situations that fall outside of the offense definition, because chemical impairment occurred after the person operated a vehicle. Because these are matters dealt with in the normal course of establishing evidence to prove a case, those provisions are not necessary, and should be deleted from § 4177.

Special Evidentiary and Jurisdictional Rules Not Incorporated. The corresponding current provisions contain numerous special rules that apply to just one offense, and not others. For the simplicity of this Section and the uniformity of the Proposed Code, all special evidentiary and jurisdictional rules included in 21 Del. C. § 4177 and 23 Del. C. § 2305 should be removed. Having special rules in one case opens the door to having special rules in other cases, has the potential to dramatically complicate criminal litigation. Instead, there should be a uniform rule on these issues to apply in all cases. The Rules of Evidence are sufficiently broad to cover the offense of operating a vehicle while chemically impaired, and there are already general jurisdictional rules that determine how cases are distributed.

Special Grading Provisions Not Included in this Section. Section 1205 does not incorporate any of the grading adjustments for repeat offenders currently provided in 21 Del. C. § 4177(d) and 23 Del. C. § 2305(1)-(4). In the Proposed Code, all general grade adjustments are dealt with in Section 804 of the General Part. Additionally, Section 1205 does not incorporate the mandatory minimum punishment provisions provided in § 4177 or § 2305 because all minimum sentencing provisions in the Proposed Code are set forth in Section 802.

Offense in 11 Del. C. § 1249 Not Included in this Section. Section 1205 does not include the offense of abetting a violation of driver's license restrictions found in 11 Del. C. § 1249. The offense conduct provided in § 1249 essentially amounts to aiding someone to drive while intoxicated and this will already be covered by General Part provisions in Section 702 (solicitation) and Section 211 (complicity). Accordingly, it would be redundant to include the specific offense in Section 1205.

Comment on Section 1206. Genital Mutilation of a Female Minor

Corresponding Current Provision(s): 11 Del. C. § 780

Comment:

Generally. Section 1206 defines an offense prohibiting persons from circumcising or otherwise mutilating the genitalia of a female under eighteen and prohibiting parents or legal guardians of females minors from allowing such acts to be performed on them. The prohibition applies regardless of any custom, culture, or ritual that either requires or permits these procedures.

Relation to current Delaware law. Section 1206 corresponds with 11 Del. C. § 780. Section 1206(a) provides the offense definition, closely tracking § 780(a). Section 1206(b) tracks § 780(c), but expands the "no defense" provision to provide that it is not a defense that the procedure was either required *or permitted* as a matter of custom, ritual, or standard practice. This captures more potential defenses than the current provision. Section 1206(c) grades the offense as a Class 6 felony, tracking § 780(b). Although the proposed grade is not exactly the

same as the current grade (Class E felony), it is justifiable because the act is essentially a serious assault without valid consent, making it akin to aggravated assault—a Class 6 felony in the Proposed Code.

Note that, unlike § 780, the proposed Section 1206 does not raise lack of consent to the procedure as an issue because consent cannot be a defense to this offense. Although the Proposed Code recognizes a general consent defense in Section 208, the defense would not apply to an offense under Section 1206 because of an important exception: a victim cannot consent to the infliction serious bodily injury. Genital mutilation results in serious bodily injury because it involves the removal or damaging of a major organ in a woman's body.

Applicability to Adult Women. Although the offense does not apply to adult women, the act of circumcision performed on adult women qualifies as a form of amputation covered by the offense of "heinous assault" in Section 1202(b)(1)(A).

Comment on Section 1207. Terroristic Threats and Hoaxes; Menacing

Corresponding Current Provision(s): 11 Del. C. §§ 602, 621, 622, 1240, 1301(1)g.; *see also* 805

Comment:

Generally. Section 1207 criminalizes causing fear and terror in other persons by threatening to commit a serious offense, menacing, or by terroristic hoax. The offense addresses the grave fear for personal safety or security that such threats may cause, even when the threatened crime is not carried out, or even intended. Although current law does not make the distinction, Subsection (b)(2)(A)(ii) refers to not a threat, but rather a terroristic hoax. Section 1207 has been titled to reflect the difference.

Relation to current Delaware law. Section 1207(a) combines the offense definitions in 11 Del. C. §§ 602, 621(a)(1) & (3), 622, and 1240(a). Yet, the offense definition leaves several distinctions in current law to be covered by grading, including the victim's status as a public official or public servant, and the particular methods of creating fear under Subsection (a)(2). Subsection (a)(1)(B) is substantially similar to the definition of terroristic threatening in 11 Del. C. § 621(a)(1); but, Subsection (a)(1)(A) has been added to clarify requirements that are implicit in the current offense. Current § 621(a)(1) provides no culpability requirement, meaning that recklessness is read into the provision under 11 Del. C. § 251(b). But the current offense does not make clear in what way a person could recklessly make a terroristic threat, because the conduct of making a threat is usually, if not always, intentional. More likely, a person could make a threat, while reckless as to whether the threat would cause another person to feel terrorized. Subsection (a)(1)(A) reflects this understanding of the current offense. But note that Subsection (a)(1)(A) does not add a *result* element, which is not present in current law—in other words, no one needs to actually feel terrorized by the defendant's threat. In making the threat, the defendant must consciously disregard a substantial risk that another person will experience extreme fear or distress because of the threat.

Section 1207(b) grades the offenses combined in this Section. Subsection (b) preserves the grades of the offenses in §§ 602, 621, 622, and 1240, except for Subsection (b)(2)(A)(i), which has been lowered one grade level because of the enormous gulf in grading between simple and aggravated menacing in current law. Simple menacing is an unclassified misdemeanor with a

maximum sentence of 30 days' imprisonment, while aggravated menacing is a Class E felony, with a maximum sentence of 5 years' imprisonment—a 60-fold increase. Subsection (b)(2)(A)(i) sets the grade of aggravated menacing at Class 8 felony to reduce this disproportionality, but still respect the decision of the General Assembly to make it a felony offense.

Section 1207(b)(1)(A) corresponds to the terroristic threatening of public officials in 11 Del. C. 1240. Subsection (b)(1)(B) sets the default grade for terroristic threats, corresponding to § 621(b). Subsection (b)(2)(A)(ii) corresponds to § 622 (hoax device). Although the conduct covered is essentially the same, Subsection (a)(2) uses a more objective standard than § 622 for determining liability. Unlike § 622, which requires a showing of intent by the offender to cause anxiety, unrest, fear, or personal discomfort through the offender's use of a hoax substance or device, proposed Subsection (a)(2) focuses only on the offender's intent to cause another person's believe in exposure. The proposed subsection's focus on intentional causation by any means makes it unnecessary to retain the provisions of § 622 that enumerate specific conduct (e.g., possesses, transports, etc.) and types of devices (e.g., destructive device, incendiary device, etc). Thus, proposed Subsection (a)(2) incorporates a much simpler version of § 622 into the Code, while still retaining the same grade for the offense. Note also that, like in many other offenses, if the resulting harm (belief in exposure) is not actually caused, then the offender will only be liable for the attempt under Section 701. Note that Subsection (b)(2)(A)(ii) does not include the mandatory minimum fine provided in § 621(c) and (d). All minimum sentencing provisions in the Proposed Code are set forth in Section 802.

Section 1207(b)(2)(B) incorporates 11 Del. C. § 1301(1)g., which makes it an offense to "[congregate] with other persons in a public place while wearing masks, hoods or other garments rendering their faces unrecognizable, for the purpose of and in a manner likely to imminently subject any person to the deprivation of any rights, privileges or immunities secured by the Constitution or laws of the United States of America." By refocusing the offense upon the threat of imminent harm created by such behavior, Subsection (b)(2)(B) can grade the offense higher than it is under current law (an unclassified misdemeanor for disorderly conduct). Subsection (b)(2)(C) preserves the default grade for menacing in current law.

Cross Burning and Other True Threats. Section 1207 implicitly covers cases that would currently be prosecuted under 11 Del. C. 805, which prohibits the burning of crosses or other religious symbols. An individual who burns a cross or other religious symbol with the intent of communicating a threat of harm to others satisfies the elements of Section 1207. Cross burnings carry a "long and pernicious history as a signal of impending violence." *Virginia v. Black*, 538 U.S. 343, 363 (2003). Such actions are not protected under the Constitution; cross burnings conducted with the intent to intimidate others are an example of a true threat, *Watts v. United States*, 394 U.S. 705, 708 (1969), and "encompass[es] those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Black*, 538 U.S. at 359. States are permitted to ban such "true threats" as the prohibitions are not meant to regulate the content of any messages that might be conveyed through the cross burning, but are meant to "protect[] individuals from the fear of violence and the disruption that fear engenders, as well as from the possibility that the threatened violence will occur." *Id*. at 344.

One does not burn a cross in full view of others lightly, and is at least "reckless as to causing another person to experience extreme fear or distress." Proposed Section 1207(a)(1)(A). Moreover, in light of the history associated with cross burnings, such actions, committed with

the intent to intimidate carry an implicit "threat[] to commit any offense likely to result in death, or serious injury to person or property." Subsection 1207(a)(1)(B).

Public Alarms Reserved. 11 Del. C. § 621(a)(2) defines as a part of terroristic threatening making false statements that are likely to cause evacuations and other public inconvenience. This has not been incorporated in Section 1207. Such acts are more appropriately categorized in proposed Section 4102 as offenses against public safety, rather than threat offenses.

Comment on Section 1208. Unlawfully Administering Drugs

Corresponding current provision(s): 11 Del. C. §§ 625, 626

Comment:

Generally. Section 1208 criminalizes administering drugs to another person and intentionally causing an alteration of that person's physical or mental condition as a result.

Relation to current Delaware Law. Section 1208(a) combines the offense definitions in 11 Del. C. §§ 625 and 626, but also makes a few changes to the current offense definitions. First, Subsection (a)(1) does not include the language about controlled substances or counterfeit drugs that is included in the offense definition of § 626. Currently, the only difference between an offense involving regular drugs (§ 625) and an offense involving controlled or counterfeit drugs (§ 626) is the grade; § 625 is a Class A misdemeanor, while § 626 is a Class F felony. Section 1208(a), however, does not need to distinguish between this offense conduct anymore because the grade for this offense has been raised to a Class 8 felony in Section 1208(b). The grade has been changed to reflect the offense's similarities to simple assault in Section 1202(a)(1), which is also graded as a Class 8 felony (except when committed by means of a firearm or other dangerous weapon). Because this offense requires intentional culpability for what essentially amounts to a simple assault, i.e., causing physical injury, it should be graded similarly.

Lesser Included Offense to Assault. To the extent that Section 1208 deals with the administration of drugs that causes physical harm, it is a lesser included offense to assault. It is only where the conduct causes an alteration of the victim's mental condition, but no physical harm, that the offense is materially different from the general assault offense in Section 1202.

Comment on Section 1209. Reckless Infliction of Severe Mental or Emotional Harm

Corresponding current provision(s): 14 Del. C. § 9302-03; 16 Del. C. §§ 1131, 1136; 31 Del. C. §§ 3902, 3913

Comment:

Generally. Section 1209 defines and grades the offenses of abuse of vulnerable persons and hazing. Section 1209(a) defines the offense of abuse of vulnerable persons, which includes recklessly causing mental or emotional harm or failing to provide necessary care to especially vulnerable victims. Section 1209(b) defines the offense of hazing, which includes recklessly creating a substantial risk of mental or emotional harm to another person for the purpose of initiating them into an organization. Section 1209(c) grades both of these offenses.

Relation to Current Delaware Law. Section 1209(a) combines the neglect and emotional abuse element of the offenses in 16 Del. C. § 1136(a)-(b) and 31 Del. C. § 3913(a), (c) to create a new offense definition. Although the offense conduct remains largely the same, there are some differences between the current offenses and the proposed section that are important to note. First, Section 1209(a) only covers mental and emotional harm to vulnerable persons; it does not cover conduct that causes physical injury, death, or sexual offense to vulnerable persons because such offenses are covered elsewhere in Chapters 1100-1300. (All offenses that apply specifically to vulnerable persons will receive a grade increase under the "vulnerable persons" provision in Section 804 of the General Part.) Second, Section 1209(a) removes the word "knowingly" from the current offense definition's phrase "knowingly and recklessly," stating the culpability requirement simply as "recklessly." Culpability requirements establish the minimum level of culpability that the State is required to prove to convict someone of the offense. A person can thus always be convicted of an offense where he or she acted with a state of mind greater than the minimum level required in the offense definition. Because "knowingly" is a higher level of culpability than "recklessly," it is necessarily sufficient for conviction of an offense requiring "recklessly" and need not be stated explicitly in the offense definition. Finally, Section 1209(a) does not include a provision corresponding with § 1136(d) providing for special liability where directors or high managerial agents know that patients or residents of a facility are being abused and fail to take remedial action. This provision is redundant with omission liability provided for in Section 204, which provides that omission may be the basis for a conviction where a defendant has a legal duty to prevent a harm but fails to do so. In the case of vulnerable persons in facilities, it is fair to assume that directors or high managerial agents that have knowledge of abuse would be bound by a legal duty to prevent or remedy that abuse. Accordingly, a special provision relating to this situation in Section 1209(a) is unnecessary.

Section 1209(a)(2)(A) provides that a person commits an offense under this Section if that person recklessly causes mental or emotional harm to a particular kind of victim. Subsection (a)(2)(A) is intended to capture the resulting harm described in the "emotional abuse" provisions in 16 Del. C. § 1131(1)c. and 31 Del. C. § 3902(1)b.

Section 1209(a)(3) lists the kinds of people an offender would have to abuse or neglect to be subject to a prosecution for an offense under this Section. Subsection (a)(3)(A) includes "vulnerable persons" within the class of victims to whom this offense applies. Note that under the proposed Section 1209, the term "vulnerable person" is given the more expansive definition provided in Section 804, instead of the one currently provided in § 3913, which defines a "vulnerable person" as an "adult who is impaired." This expanded definition allows the offense to capture more victims deserving of its protection. Subsection (a)(3)(B) includes any "patient or resident of any facility where medical or personal care is provided," within the class of victims to whom this offense applies. The phrase "any facility where medical or personal care is provided" incorporates by reference the kinds of facilities enumerated in 16 Del. C. § 1131(4). For the purposes of this Section, the term "medical care" includes psychiatric care, as provided in § 1131(4).

Section 1209(b) provides the offense definition for hazing, corresponding with 14 Del. C. §§ 9302 and 9303. Section 1209(b) makes some changes to §§ 9302-03. First, it eliminates any part of the offense definition having to do with physical injury, because that is already covered by the assault and reckless injuring offense in Sections 1202-03, or property damage, because that is already covered by the criminal damage offense in Section 2304. Second, the offense definition has been adjusted to make it more consistent with reckless endangerment. Specifically,

the offense definition no longer lists examples of particular activities that constitute hazing. Under the proposed Section 1209(b), *any* activity that creates a substantial risk of mental or emotional harm constitutes hazing as long as it is done with the intent to initiate, admit, or renew membership of a person into an organization is met. This subjective intent requirement in Subsection (b)(2) is fairly narrow to balance out the broad offense definition. Note also that Subsection (b)(2) expands the types of organizations that can be involved in hazing to all organizations, rather than only organizations that are officially sanctioned or recognized by an institution of higher education, as § 9302 provides. The potential harm of pressuring an individual into an organization is equally blameworthy no matter what the organization is.

Section 1209(c) preserves the grades for the offenses in §§ 1136, 3913, and 9302.

Note that the term "severe mental or emotional harm" is not defined. None of the provisions upon which Section 1209 is based provides guidance for a definition, which is probably because the concept is too situation-specific to be defined with satisfaction. Yet, one factor that might suggest severity is whether the harm is the length of time that the harm persists.

Comment on Section 1210. Definitions

Corresponding current provision(s): 11 Del. C. §§ 222, 3913; 21 Del. C. § 4177

Comment:

Generally. This Section provides definitions of key terms used in this Chapter.

Relation to current Delaware law. Section 1210(a) defines the term "chemically impaired," which is used in the offense definition in Section 1205(a). The definition directly corresponds to 21 Del. C. § 4177(a), (c)(1), (c)(7), and (c)(11) incorporating the standards used to define what is meant by "under the influence of alcohol or drugs or with a prohibited alcohol or drug content." The term "chemically impaired" has been used instead because it is less cumbersome to read, making the offense (and others in the Proposed Code) easier to understand. Use of the general exception, "except as authorized by law" incorporates § 4177(c)(8). Note that the phrase "or another intoxicating substance" in Subsection (a)(1)(B) is intended to capture any other substance that is capable of affecting a person's judgment, control, or due care in a manner similar to alcohol and controlled substances. This includes references throughout § 4177 to "any substance or preparation having the property of releasing vapors or fumes which may be used for the purpose of producing a condition of intoxication, inebriation, exhilaration, stupefaction or lethargy or for the purpose of dulling the brain or nervous system." Note also that the standards provided in 21 Del. C. § 4177(a) are identical to those in 23 Del. C. § 2302(a).

Section 1210(b) provides a definition of "physical injury" that corresponds to 11 Del. C. § 222(23). Yet, the definition has been extended to include physical harm that would *normally* cause substantial pain, even if such pain is not experienced by the particular victim of an offense. For instance, a victim's sensitivity to pain may be dulled if he is chemically impaired, yet, infliction of physical harm that under normal conditions would have caused substantial pain would amount to physical injury under the Proposed Code.

Section 1210(c) provides a definition of "serious physical injury" that is taken directly from 11 Del. C. § 222(26). Note, however, that it includes the extended definition of serious injury from Section 1210(b).

CHAPTER 1300. SEXUAL OFFENSES

Section 1301. Rape and Sexual Assault
Section 1302. Prohibited Sexual Contact by Persons in Positions of Trust
Section 1303. Bestiality
Section 1304. Prohibited Conduct by a Person Convicted of a Sexual Offense Against a Child
Section 1305. Sexual Harassment
Section 1306. General Provisions Relating to this Chapter
Section 1307. Definitions

General Comment Regarding Chapter 1300:

Corresponding Current Provision(s): 11 Del. C. §§ 777A, 1112A, 1112B, 4205A

Comment:

There are a few provisions in the current Delaware law on sexual offenses that this draft of Chapter 1300 does not address.

First, Chapter 1300 does not include 11 Del. C. § 777A, which makes it an aggravated offense for a sex offender to later commit an offense against a child. Like the hate crime provision and offense against a vulnerable adult, § 777A is a hybrid between an offense and a general grade adjustment. It is a separately charged offense, but the grade of the offense is reached by increasing the grade of an underlying offense. The repeat offense grade provisions from § 777A are not included because proposed Section 804 contains a general adjustment for repeat offenses.

Second, Chapter 1300 does not include 11 Del. C. § 1112A or 1112B, sexual solicitation of a child and promoting sexual solicitation of a child, respectively. These provisions rely on 11 Del. C. § 1100(7) definitions of "prohibited sexual act" that are generally broader and less nuanced than those used in the Proposed Code. Moreover, such offenses are unnecessary in the Specific Part of the Proposed Code, as solicitation to commit the acts *prohibited by the Proposed Code* would be covered by the application of its General Part. For instance, solicitation of children to engage in sexual acts prohibited by the Proposed Code would be covered by the inchoate offense of solicitation in Section 702 combined with the relevant predicate offense prohibiting the conduct (such as sexual assault in Section 1301, public indecency in Section 1401, or creation of child pornography in Section 4204).

Finally, Chapter 1300 does not include 11 Del. C. § 4205A, a minimum sentencing provision for repeat sex offenders and certain sexual offenses committed against children under 14 years of age. All minimum sentencing provisions in the Proposed Code are set forth in Section 802. See the Commentary to Section 802 for a thorough explanation of the Proposed Code's approach to minimum sentences.

Comment on Section 1301. Rape and Sexual Assault

Corresponding Current Provision(s): 11 Del. C. §§ 761, 762, 767, 768, 769, 770, 771, 772, 773, 774, 777, 778, 778A

Comment:

Generally. Section 1301 creates an offense prohibiting persons from engaging in sexual contact, including intercourse, penetration, and other contact, with another person in situations that indicate not only a lack of consent, but that the offender is or ought to be aware of that lack of consent. This includes situations where the offender has used force, coercion, or deception against the victim, where the offender has substantially impaired the victim's power to control the victim's own conduct by administering intoxicants or employing other means to prevent resistance, or where the victim is unable to understand or consent to the act due to immaturity, unconsciousness, or other impairment.

Relation to current Delaware law. Section 1301 brings together the four degrees of rape in 11 Del. C. §§ 770–73 and the three degrees of "unlawful sexual contact" in 11 Del. C. §§ 767-69, as well as elements of other provisions that bear upon the grading or availability of defenses to these offense. "Unlawful sexual contact" has also been renamed "sexual assault," reflecting its similarity to assault in Section 1202. The elements of the various forms of rape and sexual assault under current law are so many, and so varied, that they produce inconsistent results based on the precise nature of the sexual act performed and the relative ages of the victim and offender. Section 1301 seeks to preserve the policies underlying the current rape and sexual assault laws while reconciling inconsistencies as much as possible.

Offense Definition. Section 1301(a) contains the offense definition for rape, oral or object penetration, and sexual assault, which tracks all four current degrees of rape and three current degrees of "unlawful sexual contact." But, instead of using the phrase "without consent," and then defining "without consent" in a separate subsection, the definition of "without consent" (and the inability to consent) in 11 Del. C. § 761(j)–(k) is incorporated into the offense definition. Although that makes the offense definition of Section 1301 longer and more comprehensive than it might otherwise be, it allows the offense to function without muddying the definition of "consent" as it is used in Section 208 to apply to all offenses. In Subsection (a)(1), the common requirement that the offender "intentionally" engage in sexual contact with the victim has been removed to make it clear that the offender need not intend that the contact be without the victim's consent. In practice, this missing culpability element will not create additional, undeserving offenders, because the additional offense elements are already rather demanding.

In incorporating the definition of "without consent" into the offense definition, Subsection (a)(2) also consolidates inconsistent or redundant language currently included in the definition of "without consent" or in the §§ 767-773 offenses themselves. For example, Subsection (a)(2)(A) removes the lengthy description in 11 Del. C. § 761(j) of what conduct constitutes coercion and simply refers to "coercion," incorporating by reference the definition from proposed Section 1404, which includes use of force or threats against a third person. Similarly, Subsection (a)(2)(A) uses the term "deception" to capture all forms of deception described in § 761, including abuse of a position of trust in § 761(j)(4). The offense definition in Section 1301(a) also removes the reference to victim resistance currently included in the definition of "without consent" because it is inconsistent with the clause about a reasonable person: if the offender's act would cause a reasonable person to submit, the victim's reaction in the moment is immaterial. The primary focus of this offense, as in all other offenses, is on the acts and culpability of the offender, not on the victim's response. The victim's resistance, however, may be considered as a factor in determining the offender's culpability, because it speaks to what the offender knew or risked while engaging in the offense conduct.

Section 1301(a)(2)(B) corresponds to the situations described in 11 Del. C. § 761(j)(2)–(3), where an offender knows a victim is unable to consent or does not understand the nature of the act, due to, *inter alia*, cognitive impairment or unconsciousness. Subsection (a)(2)(C) covers the situation described in § 761(j)(5), where the offender has substantially impaired the victim's ability to understand and control his or her own conduct through the use of intoxicants on the victim or other means of preventing the victim's resistance. Subsection (a)(2)(D) incorporates the age restriction on consent formerly included in the § 761(k) definition of "without consent," as well as the age restriction in the offense definition in § 771(a)(1), which both cover conduct done to a child under sixteen. Although § 771(a)(1) currently requires that the victim be less than sixteen years old and the offender be at least ten years older than the victim, § 761(k) only requires that the offender be at least four years older when the victim is less than sixteen and the distinction in age gaps is not significant enough to increase the grade of the offense—doubling maximum punishment—which is the smallest increase available. Accordingly, the proposed Subsection (a)(2)(D) removes the distinction. Subsection (a)(2)(D)(ii) creates another specific age restriction on consent where the victim is under twelve years old. This corresponds with § 769(a)(3), but changes the victim's age from thirteen to twelve to make all the age cutoffs in this section consistent with § 773(a)(5). Note that current law contains an ambiguity as to the age required for sexual contact with a person less than 12 years of age to constitute an offense. Subsection (b)(1)(B), reflecting current law, aggravates rape where the offender is over 18 years of age; but, this implies that all persons under 18 would be guilty of base-line rape under Subsection (b)(3). Note however, that issues pertaining to the treatment of minors are addressed outside of the Proposed Code, in Title 10.

Grading. Section 1301(b)–(d) grades the various forms of rape, oral or object penetration, and sexual assault. Generally, each specific grade aggravation does not account for age, like the current offenses do, because a victim's age is now captured within the offense definition in Subsection (a)(2)(D). Note also that the grading scheme in Subsections (b)(1)-(3) apply not only to acts of sexual intercourse, but to oral or object penetration and sexual contact as well, unless specified otherwise. In this way, aggravating factors can be consistently applied to any of the three different kinds of sexual conduct captured by Section 1301. Subsections (c) and (d) increase the grade of the offense a set number of grades if the offense conduct is either sexual intercourse or oral or object penetration. These provisions must always be read together to reach the ultimate grade of the offense. This grading scheme is complex, but rational and comprehensive: every aggravation is consistently applied, and the relative blameworthiness of different sexual conduct is maintained in every case.

Subsection (b)(1) describes circumstances under which the offense conduct will be graded most harshly as enhanced aggravated sexual assault, enhanced aggravated oral or object penetration, or enhanced aggravated rape. Subsection (b)(1)(A)(i)(aa) corresponds with 11 Del. C. §§ 772(a)(2)a., 772(a)(2)c., and 773(a)(1), providing a higher grade where the offender causes serious physical injury to the victim. Note, however, that unlike in §§ 771(a)(2)a. and 773(a)(1), mental or emotional injury are not included as a basis for aggravation because this kind of psychological injury is likely going to be present in every sexual offense. Resulting psychological harm is built into the offense by grading it severely. Subsections (b)(1)(A)(i)(bb)-(cc) correspond with §§ 767(a)(1), 773(a)(3), and 772(a)(2)d.-e. to create a higher grade for the display of deadly weapons and objects intended to appear as deadly weapons or the threat of possession of those objects. Note, however, that there is a separate offense for possession of a firearm during commission of a felony in Section 5101, and that both 11 Del. C. § 206 and

propose Section 210 would not allow a defendant to be convicted of both that offense and rape or sexual assault under Section 1301(b)(1)(A)(ii)(bb) (though a defendant could be charged with both). Note also that the proposed Subsection (b)(1)(A)(i)(bb) makes a slight change to the language in the current sections about objects that "appear to be a deadly weapon," requiring instead that the offender intend that the object appears to be a deadly weapon for the purposes of terrorizing the victim. This intent requirement justifies the drastic grade increase of two grades where a deadly weapon is not actually present. Subsection (b)(1)(A)(ii) corresponds with the current provisions in §§ 773(a) and 772(a), providing that, to qualify for aggravated grading, all of the preceding conduct must take place during commission or attempted commission of, immediate flight from, or attempt to prevent reporting of, the offense.

Subsection (b)(1)(B) corresponds with §§ 769(a)(3), 772(a)(2)g., and 773(a)(5). Subsection (b)(1)(C) corresponds with §§ 772(a)(2)f. and 773(a)(4), but is reworded slightly to distinguish between remote and immediate accomplices and capture the situation of "gang rape," an especially heinous act deserving of greater punishment. Unlike in other subsections, sexual intercourse and oral or object penetration are specified as offense conduct in Subsection (b)(1)(B) to make clear that, like under current law, liability is not increased for what might be called gang "unlawful sexual conduct," (or, in the Proposed Code, gang "sexual assault"). Like in current law, sexual intercourse, and oral or object penetration are required for the increased liability under this Subsection.

Note that the proposed grade of enhanced aggravated rape—a Class 3 felony—is roughly one grade lower than that provided in current law for similar conduct (Class A felony). The legislation authorizing this Proposed Code mandates that "disproportionate" statutes be identified and rectified. The proportionality of an offense's authorized punishment is directly tied to the grade assigned to that offense. An offense's grade could be either disproportionately high *or* low. The nonpartisan consultative group supervising the drafting process for this Proposed Code has scrutinized the relative grading of all offenses, and has decided that this offense's grade is disproportionately high when compared to other offenses of the same grade in current law. The grade of this offense has been changed to reflect that judgment.

Subsection (b)(2) describes circumstances under which the offense conduct will be graded more harshly as aggravated sexual assault, aggravated oral or object penetration, or aggravated rape. Subsection (b)(2)(A) corresponds with 11 Del. C. §§ 769(a)(1), 771(a)(2)a.–b., and 773(a)(1), establishing a grade increase where an offender causes physical injury to a victim during the commission or attempted commission of, flight from, or attempt to prevent the reporting of an offense. Subsection (b)(2)(B) corresponds with § 771(a)(1), establishing a grade increase where the victim is under fourteen years old. Note, however, that the proposed subsection removes the requirement in § 771(a)(1) that the offender be at least nineteen years old, because 11 Del. C. § 777(b) effectively amends the rape statute to require a smaller age differential and the Proposed Code preserves that part of § 777. Subsection (b)(2)(C) corresponds with §§ 772(a)(2)b. and 773(a)(2)a., establishing an higher grade where the offense occurred during the commission or attempted commission of another felony. Note, however, that the proposed Subsection removes the increased grading for an offense occurring the commission or attempted commission of certain misdemeanors. This is because misdemeanors are punished by, at most, one year of imprisonment, while this Subsection represents a fourfold increase in maximum punishment over the baseline rape offense. Note also that for consistency, this grade increase applies to the offense of sexual assault, though current law does not provide for it. Note that, when applied with Subsection (d) [sexual assault], the grade of the offense is a Class 7

felony—roughly one grade higher than that provided by current law for similar conduct. The legislation authorizing this Proposed Code mandates that "disproportionate" statutes be identified and rectified. The proportionality of an offense's authorized punishment is directly tied to the grade assigned to that offense. An offense's grade could be either disproportionately high *or* low. The nonpartisan consultative group supervising the drafting process for this Proposed Code has scrutinized the relative grading of all offenses, and has decided that this offense's grade is disproportionately low when compared to other offenses of the same grade in current law. The grade of this offense has been changed to reflect that judgment.

Subsection (b)(3) provides the baseline grade for the offense conduct in all other cases of rape: a Class 6 felony.

When the offense under Section 1301(b)(1), (b)(2), or (b)(3) does not involve sexual intercourse, but the less serious conduct of oral or object penetration or sexual contact, Subsections (c) and (d) provide a one or three grade downward adjustment, respectively. These grade differences are consistent with the punishment levels present in current law and reflect the relatively more reprehensible nature of rape as compared to other sexual offenses. Subsection (c) covers the offense conduct in 11 Del. C. §§ 770(a)(3), 771(a)(2), 772(a)(2), but sets the grade at one level lower than rape to reflect the important distinction between acts of sexual intercourse and those of oral or object penetration. Subsection (d) covers the remaining offense conduct in 11 Del. C. §§ 767–69 relating to sexual assault. Note that the baseline offense grade for sexual assault, applying Subsections (b)(3) and (d) together, is a Class A misdemeanor—the same as under current law. Retaining the Class A misdemeanor level of sexual assault has two key benefits: first, it assists with plea bargaining, and second, it avoids overinclusion in sex offender registrations. Subsection (b)(2)(B) creates an exception to the baseline grades of offenses where the defendant is over 18 years of age. This "exception" ensures that the group of persons required to register as sex offenders would not be underinclusive, as that result would be inconsistent with current Delaware law. Note also that the proposed offense definition and grading scheme for sexual assault eliminate the provision from 11 Del. C. § 767 that allows an offender's knowledge that the sexual contact is "offensive to the victim" to be a basis for sexual assault liability. Offensive, but non-coercive, contacts are still punishable under Section 1202 as assault.

Section 1301(e) converts the specialized offense definitions in 11 Del. C. §§ 778 and 778A(1) into a grade adjustment for any offense under Section 1301 committed by a person in a position of trust, authority, or supervision *vis à vis* a victim under sixteen years of age. Using a general grade adjustment, rather than having separate offenses, allows the increased punishment to cover all of the individual scenarios present in Section 1301 without having to reproduce these scenarios or accidentally contradict them in a separate offense. The proposed grade aggravation is consistent with the judgments made in § 778 because it preserves the most severe penalties envisioned by § 778 by increasing the grade to a Class 1 felony—enabling life imprisonment—in the most reprehensible scenarios. Yet, Subsection (b)(6) is meaningfully different from §§ 778 and 778A(1) in that it applies only where the victim is less than sixteen years old, while some of §§ 778 and 778A's provisions apply where the victim is between sixteen and eighteen years old. The provisions in §§ 778 and 778A that apply to victims between sixteen and eighteen years old are given effect in proposed Section 1302. Section 1302(a)(2)(B) makes it an offense for a person who occupies a position of trust, authority, or supervision over a child under eighteen to engage in sexual contact with that child. The grade of the offense in Section 1302(a)(2)(B)

depends on the sexual act performed: Class 5 felony for intercourse, Class 6 felony for oral or object penetration, and Class 8 felony for sexual contact.

Other Provisions. Section 1301(f) creates strict liability as to age where the victim is under fourteen years old. This section is analogous to 11 Del. C. § 762(a), except that it changes the age where strict liability attaches from sixteen to fourteen. When the victim is sixteen, there is a much greater likelihood of the offender making a genuine mistake as to the victim's age, thereby negating culpability. It is virtually impossible, however, for the offender to honestly believe that a fourteen-year-old child is the age of consent. Note that it is uncommon for other jurisdictions in the United States to impose strict liability at all in the way Delaware does; and among those that do, age fourteen is the average age used for strict liability. Note also that the proposed provision in Section 1307(a) balances out this proposed change to current law by establishing the lowest culpability requirement as to knowledge of the age of a victim between fourteen and sixteen years of age.

Section 1301(g) is analogous to 11 Del. C. § 771(c), making it a requirement of a convicted offender's probation to pay child support to the victim where the offense resulted in the birth of a child.

Dangerous Crime Against a Child Provisions Not Incorporated. Three provisions from 11 Del. C. § 777 relating to dangerous crimes against a child have not been incorporated into this Proposed Code. First, the provision in § 777(a), establishing an affirmative defense where the offender believed the victim was over the age of sixteen, is no longer necessary, because the age of strict liability has been lowered to twelve. Second, the offense of sexual abuse by a person in a position of authority, trust, or supervision, to which § 777 generally applies, has already been taken into account in the Proposed Code as a grade aggravator and is no longer an independent offense. Finally, the child pornography offense referenced as a predicate offense for liability under § 777 has been incorporated into Section 4204, where it is already a Class 4 felony. Because the grade of the new offense in Section 4204 corresponds with § 777's grading aggravation, the aggravation no longer has any effect except to allow multiple convictions for the same conduct.

Sexual Extortion. Chapter 1300 does not include 11 Del. C. § 774, which prohibits sexual extortion, as a separate offense. It is not included for two reasons. First, § 774 is redundant with the current definition of "without consent" used for the rape and "unlawful sexual contact" offenses. Second, but related, all extorted sexual conduct—whether intercourse, penetration, or contact—is punished as a Class E felony under § 774, which either discounts or increases punishment depending on which conduct is at issue, when compared to the same conduct under the current rape or unlawful sexual contact offenses. Because of these inconsistencies, § 774 is not given independent effect in the Proposed Code, but is covered entirely by Section 1301.

Indecent Exposure Not Incorporated. The provisions in 11 Del. C. § 778A prohibiting indecent exposure done to a minor victim by a person in a position of trust, authority, or supervision have not been incorporated because indecent exposure is not contained in Chapter 1300. Indecent exposure is now included in the Public Indecency offense in Section 4201. Although this offense isnot contained within Chapter 1300 and thus, not incorporated into Section 1301, the aggravation will still apply individually to the offense contained in the other chapter when done to a minor victim by a person in a position of trust, authority, or supervision.

Comment on Section 1302. Prohibited Sexual Contact by Persons in Positions of Trust

Corresponding Current Provision(s): 11 Del. C. §§ 778, 1259; 16 Del. C. §§ 1131(1)b, 1136(a)

Comment:

Generally. Section 1302 proposes a new offense that prohibits persons from engaging in sexual contact with victims who are especially vulnerable to them. This includes victims in custody at detention facilities where the offender works at the facility, children under eighteen where the offender is in a position of trust, authority, or supervision over them, and patients or residents of facilities providing medical or personal care where the offender works at the facility. As it is used in this offense, sexual contact is inclusive of sexual intercourse and oral or object penetration. The grade of the offense depends on the particular sexual act performed.

Relation to current Delaware law. Currently, Title 11 does not have an offense like Section 1302. Yet, the current law does recognize special situations where even consensual sexual contact is wrongful because of the vulnerable relationship between the victim and the offender. Unlike the current law, which carves out exemptions for these situations as "ineffective consent" and scatters them throughout various other offenses, the proposed Section 1302 provides a unified offense capturing all of these special situations. This provides clarity and avoids inconsistency and redundancy in the Chapter.

Section 1302(a) defines the offense. Note that lack of consent is not an element of the offense definition because a person can be liable for this offense whether or not consent is given. Where consent is given, it is nevertheless deemed ineffective because of the unequal nature of the relationship between the participants. Subsection (a)(2)(A) corresponds with 11 Del. C. § 1259, making it an offense for anyone working at a detention facility to engage in sexual contact with persons in custody there. Subsection (a)(2)(B) corresponds with 11 Del. C. § 778(3)-(4), making it an offense for persons in positions of trust, authority, or supervision over children under eighteen to engage in sexual contact with them. Subsection (a)(2)(C) is based on the "sexual abuse" offense in 16 Del. C. §§ 1131(1)b. and 1136(a), making it an offense for anyone working in a facility that provides medical or personal care to engage in sexual contact with residents or patient of the facility. "Facility" is given the meaning provided in the definition in 16 Del. C. § 1131(4). Note that "medical care" includes psychiatric care.

Section 1302(b) grades the offense depending on the sexual act performed upon the victim. Subsection (b)(1) provides that the offense is a Class 5 felony if it involves sexual intercourse. Subsection (b)(2) provides that it is a Class 6 felony if it involves only oral or object penetration. Subsection (b)(3) provides that it is a Class 8 felony if it involves only sexual contact. These grades do not align precisely with the grades of the current underlying offenses because some of the current offenses punish all sexual conduct the same, or punish one kind of sexual conduct but not another. But, the new grading scheme is preferable for three reasons. First, it unifies the currently scattered offenses and their grading. Second, having a unified scheme of grading based on the sexual conduct performed is important for the consistency of the Chapter as a whole, the clarity of Section 1302, and the preservation of Delaware's current policy that an offender's blameworthiness depends, in part, on the relative level of intrusiveness of the sexual act he has committed. Finally, it makes sense for the grades here to match the baseline grades of the three kinds of offense conduct (sexual intercourse, oral or object penetration, and sexual contact) in Section 1301, because the offenses in this Section cover

situations where consent may have been given, but is essentially ineffective because of the special relationship between the victim and the offender. Although sexual contact in these situations where consent is ineffective is certainly blameworthy, it is materially less blameworthy than sexual contact committed under the circumstances required for aggravated grading provided in Section 1301.

Comment on Section 1303. Bestiality

Corresponding Current Provision(s): 11 Del. C. § 775

Comment:

Generally. Section 1303 creates an offense prohibiting persons from engaging in sexual contact with animals. This offense also covers situations where a person causes another to engage in sexual contact with an animal for his or her own sexual gratification.

Relation to current Delaware law. Section 1303 directly corresponds to 11 Del. C. § 775 and is graded the same, but with some slight differences. First, the offense definition has been broken into its constituent elements for easier reading and application. Second, as is the case throughout the proposed Chapter 1300, the phrase "sexual contact" is used alone to refer not only to intentional sexual touching or undressing of another, but also sexual intercourse and oral or object penetration.

Comment on Section 1304. Prohibited Conduct by a Person Convicted of a Sexual Offense Against a Child

Corresponding Current Provision(s): 11 Del. C. §§ 1112, 777A, 4121; *see also* 11 Del. C. § 4122

Comment:

Generally. Section 1304 defines an offense prohibiting persons previously convicted of a sexual offense against a child from residing or loitering on or around the property of a school.

Relation to current Delaware law. Section 1304 corresponds closely with 11 Del. C. § 1112 with a few differences. First, Section 1304(a) breaks the offense definition down into its constituent elements for easier reading and application with the grading contained in a separate subsection. The offense definition also now includes § 4121(a)(4)'s definition of "sexual offender" as an element of the offense, rather than using the term "sexual offender" in the offense definition and defining it elsewhere. Under Subsection (a)(1), to commit this offense a person must have previously been convicted of any of the offenses enumerated in Subsections (a)(1)(A)-(F) against a person under sixteen years old. The enumerated offenses correspond with those provided in 11 Del. C. §§ 4121(a)(4) and 777A, and include offenses, such as child pornography, that have been relocated to other Chapters in the Proposed Code. Finally, Subsection (a)(2) includes a simplified definition of "school" within the offense definition, rather than defining the term in a separate subsection, as in § 1112(b)(3).

Section 1304(b) grades the offense as a Class 8 felony. Rather than grading the offense depending upon whether the offender "loiters" or "resides," like in § 1112(a), the proposed

Section 1304(b) provides only one grade for engaging in either act. Under the current grading scheme, an offender would receive less punishment for residing permanently on or near school property than temporarily loitering there. Section 1304(b) eliminates a grade discount for what essentially amounts to permanent loitering. The combined grade aims to be a middle ground between the punishment levels provided in the current scheme. Section 1304(c) does not provide a definition for "loiter," because the term has already been defined in Section 4108(a).

Notice Requirement. Section 1304, reflecting current law, does not contain a requirement that the offender have been put on notice that he or she is subject to this offense. The United States Supreme Court has required notice in cases involving similar criminal statutes. In *Lambert v. People of the State of California*, 355 U.S. 225 (1957), the Court reversed the defendant's conviction under a felon registration statute on due process grounds because she had no actual knowledge of her duty to register. To avoid the possibility of Section 1304 being invalidated as unconstitutional, it may be beneficial to include a notice requirement. The language can be added to Subsection (a)(1), which would read: "the person has been previously convicted . . . and has been notified that they are subject to this offense . . . ."

Comment on Section 1305. Sexual Harassment

Corresponding Current Provision(s): 11 Del. C. §§ 763, 778A(3), 1311(a)(4)

Comment:

Generally. This provision defines the offense of sexual harassment.

Relation to current Delaware law. Section 1305(a) corresponds to 11 Del. C. §§ 763, the current offense that criminalizes sexual harassment, and 1311(a)(4). The language of Subsection (a) is largely incorporated from § 763 and maintains the same conduct and culpability requirements. Although current § 763(2) requires that the person know that the actor is "thereby likely to cause annoyance, offense, or alarm to that person" and the proposed offense just requires that the person "knowingly" cause annoyance, offense, or alarm to that person, the "knowing" requirement of Subsection (a)(2)(A) includes "knowledge of high likelihood," as provided in proposed Section 205(b)(2).

Section 1305(b)(2)(B) corresponds to 11 Del. C. § 763 and maintains the same relative grade (Class D misdemeanor) as the current sexual harassment offense. Subsection (b)(2)(A) sets a portion of the offense at Class A misdemeanor, as break from current law. This grade is higher than current law provides for the same conduct. The legislation authorizing this Proposed Code mandates that "disproportionate" statutes be identified and rectified. The proportionality of an offense's authorized punishment is directly tied to the grade assigned to that offense. An offense's grade could be either disproportionately high *or* low. The nonpartisan consultative group supervising the drafting process for this Proposed Code has scrutinized the relative grading of all offenses, and has decided that this offense's grade is disproportionately low when compared to other offenses of the same grade in current law, especially ordinary harassment. The grade of this offense has been changed to reflect that judgment. Subsection (b)(1)'s Class 8 felony aggravation corresponds to 11 Del. C. § 778A(3).

Comment on Section 1306. General Provisions Relating to this Chapter

Corresponding Current Provision(s): 11 Del. C. §§ 761, 762, 770, 771, 778, 778A, 780

Comment:

Generally. This section collects the provisions that apply generally to offenses in Chapter 1300. This includes special culpability requirements and exemptions from liability.

Relation to current Delaware law. Section 1306(a) provides that the State need only prove that the defendant was negligent as to the victim's age where the underlying offense requires the victim be under a certain age. The proposed Section is based on 11 Del. C. § 762(a), but has some important differences. First, Section 1306(a)'s negligence culpability requirement applies to any age mentioned in an offense definition, whereas § 762(a) only applies to offenses requiring that a victim be under sixteen. Second, Section 1306(a) provides a negligence culpability level, while § 762(a) provides for strict liability as to age where the offense requires that the victim be under sixteen, stating that a defendant's reasonable belief that the victim was over sixteen is not a defense. Section 1306(a) heightens the culpability requirement slightly to balance out the fact that it now applies to victims over sixteen as well. As a practical matter, strict liability is appropriate where the victim is under twelve because a mistake as to such a young child's age would amount to negligence per se. But, the same cannot be said for all victims less than sixteen years of age. When the victim is older, the need to demonstrate an offender's culpability as to that victim's age is more acute, as it is more likely the offender in that situation could have made an honest mistake as to whether the victim was the age of consent. Culpability is an essential element for criminal liability under Delaware law; strict liability is rarely used, and usually only in minor regulatory offenses. Lowering the age where strict liability attaches improves consistency with that practice in Delaware.

Section 1306(b) incorporates portions of 11 Del. C. §§ 761(d), 770(b), 771(b), and 780(d), to provide that medical examinations or procedures do not constitute offenses under Chapter 1300 when they are conducted with intent to provide diagnosis or treatment, by a licensed medical professional, parent, or guardian, and in a manner consistent with reasonable medical standards. The proposed section collects the medical treatment exemptions scattered throughout the current chapter and, closely tracking the current language, combines them into one general exemption applicable to all offenses under proposed Chapter 1300.

Note that Section 1306 does not include § 762(c), which makes clear that separate acts of sexual conduct can support multiple charges of the same offense; yet, it does not contain an affirmative authorization. Current law, 11 Del. C. § 762(c), permits multiple charges, but relies upon general principles of what is or is not continuing conduct to determine what conduct would count as an "act." But, as judges will make the determination of how to separate a defendant's conduct into separate chargeable offenses regardless of the nature of the offense, it is always possible to charge a defendant with multiple counts of the same offense if there are separate acts. As these general principles apply to all offenses, their availability need not be specified in Section 1306.

Comment on Section 1307. Definitions

Corresponding Current Provision(s): 11 Del. C. §§ 761, 1112

Comment:

Generally. This Section provides definitions of key terms used in this Chapter. For simplicity and clarity, the definitions have been slightly reworded from their sources in current law.

Relation to current Delaware law. Section 1307(a) defines "genitalia," a term used in current law, but not defined. The term has been given a generally-accepted medical definition.

Section 1307(b) defines "oral or object penetration," tracking the current definition of "sexual penetration" in 11 Del. C. § 761(i). The term itself has been altered to make it more descriptive, for the purpose of avoiding confusion between the meaning of "penetration" and "intercourse." The term "sexual device," used in the term's definition in current law, is substituted with "any object . . . intending the act to be sexual in nature" to provide a functional standard with which to judge between "sexual devices" and other objects. Also, Subsection (b) does not include any form of oral sex, unlike § 761(i)(2). Instead, the term "sexual intercourse" is defined to include all forms of oral sex. The two terms' definitions in current law seemed to define oral sex differently depending upon whether the defendant was the one giving or receiving oral sex. This distinction leads to variations in punishment without proper justification. The legislation authorizing this Proposed Code mandates that "disproportionate" statutes be identified and rectified. The nonpartisan consultative group supervising the drafting process for this Proposed Code has scrutinized the relative grading of all offenses, and has decided that assigning different punishments for different forms of oral sex provides disproportionately low punishments in some cases. To the extent the discrepancy between "sexual intercourse" and "sexual penetration" in current law embodies an outdated social norm, the legislation authorizing this Proposed Code supports the change on this basis as well.

Section 1307(c) defines a person in a "position of trust, authority, or supervision" over children, tracking the current definition in 11 Del. C. § 761(e). Although the proposed definition is based upon the catch-all provision in § 761(e)(7), it is intended to capture all of the specific examples from 11 Del. C. § 761(e)(1)-(6) as well. The changes are meant only to simplify the definition, not alter the meaning of current law.

Section 1304(d) defines the term "reside," corresponding directly with 11 Del. C. § 1112(b)(2).

Section 1307(e) defines "sexual contact," tracking the current definition in 11 Del. C. § 761(f). The proposed definition retains the requirement that the act be "intentionally sexual in nature," but broadens the scope of the definition to make it more thorough. The greater breadth of conduct covered by the proposed definition balances out the high bar set by the "intentionally sexual" requirement. The proposed definition of "sexual contact" also makes it clear that the term includes acts of sexual intercourse and oral or object penetration. Accordingly, when "sexual contact" is referenced in other offenses in the Chapter, it refers not only to the intentionally sexual touching or undressing of another, but to intercourse and penetration as well.

Section 1307(f) defines "sexual intercourse," breaking it down into its constituent elements. Subsection (e)(1) corresponds with 11 Del. C. § 761(g)(1). Subsection (e)(2) corresponds with 11 Del. C. § 761(b), (c), and (g)(2), but has been reworded slightly to include

all forms of oral sex—cunnilingus or fellatio, whether the defendant is giving or receiving the sexual act. Subsection (e)(3) corresponds with 11 Del. C. § 761(g)(1).

CHAPTER 1400. KIDNAPPING, COERCION, RESTRAINT, AND RELATED OFFENSES

Section 1401. Kidnapping and Unlawful Restraint
Section 1402. Human Trafficking
Section 1403. Coercion
Section 1404. Definitions

Comment on Section 1401. Kidnapping and Unlawful Restraint

Corresponding Current Provision(s): 11 Del. C. §§ 781, 782, 783, 783A, 784, 786; 16 Del. C. §§ 2223, 5023; *see also* 11 Del. C. §§ 840, 858

Comment:

Generally. Section 1401 establishes the offenses of kidnapping and unlawful restraint, which cover the offense conduct set forth in the current offenses of kidnapping and unlawful imprisonment.

Relation to current Delaware law. Section 1401(a) corresponds to 11 Del. C. §§ 781 and 782, by combining their nearly identical offense definitions and incorporating the definition of "restrain" currently found in 11 Del. C. § 786(c) to define the offense of unlawful restraint. Section 1401(a) makes some minor changes to the current definition of "restrain," including removing the explanation of what "without consent" means, because Section 208 establishes general conditions where consent is ineffective that cover the same ground. For clarity and easier application, the new offense definition in Section 1401(a) also slightly rewords the offense definition in §§ 781 and 782 by using the phrase "except as authorized by law," rather than "unlawfully," to indicate that the behavior is normally unlawful except where contradicted elsewhere in the Code. Note that the offense conduct covered by this new offense definition is broad enough to cover the offense conduct currently found in 16 Del. C. §§ 2223 (Unwarranted Confinement in a Substance Abuse Treatment Facility) and 5023 (Unwarranted Hospitalization in Delaware Psychiatric Center), rendering those offenses unnecessary.

Section 1401(b) corresponds to 11 Del. C. §§ 783 and 783A, combining their nearly identical offense definitions to define the offense of kidnapping. The current distinction between first and second degree kidnapping is retained, however, in the grading distinctions in Section 1401(c). Note that the limitation "and the person is not a relative of the victim" has been added to Subsection (b)(6) to incorporate 11 Del. C. § 784. Current § 784 is an affirmative defense that functionally redirects a prosecution for unlawful imprisonment or kidnapping to interference with custody in appropriate circumstances. The elements of interference with custody and kidnapping are fundamentally inconsistent with each other, except at Subsection (b)(6). By excluding all relatives from Subsection (b)(6), the intent and function of current § 784 is maintained more simply. It is not necessary to provide an exception for unlawful restraint because, as under current law, it has the same grade as interference with custody (organized in Chapter 4400 in the Proposed Code). Also note that under Section 210, a defendant could not be convicted of both offenses based upon the same act.

Section 1401(c) corresponds to the grading schemes in 11 Del. C. §§ 781, 782, 783, and 783A. Note that, although not explicitly stated, the harm referenced in Section 1401(c)(2)(A) includes unlawful sexual contact. Unlawful sexual contact need not be explicitly stated in the

grading scheme, as it is in § 786(a), because a victim of a sexual offense would clearly not return from kidnapping "unharmed."

Section 1401(d) describes the relationship between kidnapping and interference with custody, performing a similar cross-referential function to 11 Del. C. § 784. The substance of § 784 is not necessary to retain, for the reasons described above; but the cross-reference remains useful because the Proposed Code organizes interference with custody in Chapter 4400 (Offenses Against the Family) instead of Chapter 1400.

Shopkeeper's Privilege. 11 Del. C. §§ 840(c) and (d), and 858(d)-(f), have not been incorporated into Section 1401. Although these provisions deal with detaining persons who have violated the law, they are more appropriately placed in the Defense of Property justification defense in Section 307 of the Proposed Code, rather than as a specific defense to the kidnapping and unlawful restraint offenses in Section 1401.

Comment on Section 1402. Human Trafficking

Corresponding Current Provision(s): 11 Del. C. §§ 787, 1100A

Comment:

Generally. Section 1402 creates the offense of human trafficking, which covers the offense conduct set forth in the current offenses of trafficking an individual, forced labor and sexual servitude, and dealing in children.

Relation to current Delaware law. Section 1402 corresponds to 11 Del. C. §§ 787 and 1100A. Section 1402(a) defines the offense by breaking it into its elements for easier reading and application.

Subsection (a)(1) corresponds to § 1100A, but expands it to prohibit dealing not only in children, but in adults as well. The grade adjustment for minor victims in Subsection (b)(4)(A) allows the grade of the offense in Subsection (a)(1) to correspond to the grade of § 1100A where it involved children.[10] Note that the offense conduct in Subsection (a)(1) is graded less harshly than the offense conduct in Subsections (a)(2)–(4) to reflect the fact that, unlike those subsections, Subsection (a)(1) does not require proof of the purpose of the dealing (e.g., furthering forced labor).

Subsection (a)(2) combines § 787(b)(2) and (3) (forced labor and sexual servitude). It is unnecessary to keep § 787(b)(2) and (3) separate because they cover the same basic conduct, the only difference being that § 787(b)(2) covers the provision of generalized labor or services, while § 787(b)(3) only covers a particular kind of service: sexual service. To eliminate redundancy, but ensure that it is clear that sexual service, i.e., prostitution, is included within any "labor or service," the two sections have been combined and the phrase "including prostitution" has been added to the proposed Subsection (a)(2). Note that § 787(b)(3)a.1. has not been incorporated into Subsection (a)(2) because it is redundant with the portion of Section 4203

[10] Currently, 11 Del. C. § 1100A grades dealing in children as a Class E felony. Proposed Section 1402(b)(3) also grades Section 1402(a)(1) (dealing in persons) as a Class E felony. With the grade adjustment in Section 1402(b)(4)(A), at first glance the Proposed Code seems to set the grade for dealing in children one grade higher than it is in current law. But, under current law, Class E felonies have a five-year maximum sentence, whereas the proposed grading scheme provides a four-year maximum sentence for Class E felonies. Therefore, the grade adjustment for minor victims in proposed Section 1402(b)(4)(A) allows the grade of the offense in Section 1402(a)(1) to correspond more closely to the grade of 11 Del. C. § 1100A where it involved children.

(Promoting Prostitution) that already covers prostitution of minors and does so with more nuance, by distinguishing between prostitution of persons less than sixteen years of age and persons at least sixteen years of age but less than eighteen.

Subsection (a)(3)(A) corresponds to § 787(b)(1) and Subsection (a)(3)(B) corresponds to § 787(b)(5)a., with no material changes.

Subsection (a)(4) corresponds to § 787(b)(5)b., but makes two changes. First, it eliminates the current provision noting that the offense does not apply to organ donation, because donation (by definition) is not the *sale* of body parts. Second, it defines the "knowledge" requirement for this offense in a more concrete and practical way, stating that the defendant must have knowledge that the venture the person is benefitting financially from engages in acts constituting an offense under Subsection (a)(3)(B). Note that this provision does not require the person to know that the sale of human body parts is prohibited to satisfy the "knowledge" culpability requirement.

Section 1402(b) grades the offenses defined in Section 1402(a), corresponding closely to the current grades in 11 Del. C. §§ 787 and 1100A. The grades under Subsection (b)(1) is lower than under current law (Class A felony), and the grades under Subsections (b)(2)–(3) are higher than under current law (Class C and F felonies). The legislation authorizing this Proposed Code mandates that "disproportionate" statutes be identified and rectified. The proportionality of an offense's authorized punishment is directly tied to the grade assigned to that offense. An offense's grade could be either disproportionately high *or* low. The nonpartisan consultative group supervising the drafting process for this Proposed Code has scrutinized the relative grading of all offenses, and has decided that this offense's grades were disproportionately high or low, respectively, when compared to other offenses of the same grade in current law. The grade of these offense has been changed to reflect that judgment. Subsection (b)(4) provides grade adjustments consistent with those in § 787(b)(6)a., but unlike § 787(b)(6)a., it applies the aggravations to all offenses in the Section. Currently, offenses dealing with body part sales in § 787(5) cannot be aggravated because the offenses already have the highest grade available: Class 2 felony. By creating a Class 1 felony above Class 2, this Code allows aggravations to be applied to even those offenses currently graded as Class A felonies. Note that the grade aggravation set forth in § 787(b)(6)b. has not been included because the use of threats of force has been built into the offense definition.

Section 1402(c) establishes an exception to prosecution for offenses under Subsection (a)(1), corresponding directly to § 1100A.

Section 1402(d) provides additional penalties that may apply to offenses committed under this Section. Subsection (d)(1)(A) corresponds to § 787(e)(1), but makes forfeiture an automatic penalty, rather than one that can only be issued after a motion is made for it. Note that Subsection (d)(1)(A) does not include the provisions in § 787(e)(2)-(3) because they are procedural provisions regarding forfeiture that belong in a general provision governing all forfeiture proceedings, not just those that relate to offenses in this Section. Subsection (d)(1)(B) corresponds to § 787(c)(2) to provide for organizational forfeiture as a penalty, but does not include the additional fines for organizations provided for in § 787(c)(2)a. because the default organizational fines laid out in proposed Section 803(b) are already sufficiently high to serve the goals of both § 787(c)(2)a. and the Proposed Code. Note that because the definition of "person" in Section 107 includes non-natural legal persons, such as corporations and partnerships, both individuals and organizations convicted under Section 1402 must forfeit the property specified in (d)(1)(A). Organizations are subject to additional discretionary forfeiture under Subsection

(d)(1)(B), which is justifiable because organized trafficking likely utilizes a greater number of tainted assets and contracts. Section 1402(d)(2) corresponds to § 787(d), providing for restitution for violations of this Section.

Section 1402(e)(1) provides procedures for seeking to vacate a judgment of conviction for certain offenses that were committed as a direct result of the person being a victim of human trafficking. Subsection (e)(2) specifies that a person can make use of the procedures set forth elsewhere in Title 11 to seek mandatory expungement of criminal record information related to a conviction vacated under Subsection (e)(1). These provisions directly correspond to 11 Del. C. § 787(j)(2)–(4).

Consent and Belief Regarding Age. 11 Del. C. § 787(b)(3)c. and (b)(4) have not been incorporated into the proposed Section 1402 for two reasons. First, Section 208 of the general part already makes consent to prostitution by a minor ineffective. Second, the general mistake provisions in Section 206 cover issues of mistaken age.

Other Provisions Not Included. Some provisions in 11 Del. C. § 787 should be relocated to other titles. 11 Del. C. § 787(g) should be relocated to a title dealing with child welfare and delinquency proceedings. 11 Del. C. § 787(i) should be relocated to a title dealing with child proceedings, though related civil proceedings are generally authorized by proposed Section 104. 11 Del. C. § 787(k)-(n) should be relocated to a title more appropriately suited to their regulatory nature.

Evidence of Victim's Past Sexual Behavior. 11 Del. C. § 787(f) has not been included in Section 1402. To the extent § 787(f) deals in related civil proceedings, it should be relocated to a portion of the Delaware Code that deals in civil litigation. The remainder is redundant with the general rules governing this kind of evidence in 11 Del. C. §§ 3508-09. Yet, those provisions do not specify that they apply to human trafficking cases. They should be amended to expressly apply to Section 1402.

Pardon and Expungement for Victims. 11 Del. C. § 787(j) has not been included in Section 1402. The general provisions governing expungement and pardon are available for all persons and offenses, and do not require an affirmative authorization.

Comment on Section 1403. Coercion

Corresponding Current Provision(s): 11 Del. C. §§ 791, 792

Comment:

Generally. Section 1403 defines and grades the offense of coercion. This Section also provides a defense to any prosecution for coercion committed by means of threatening that the victim or another person be charged with a crime where the defendant believed the threatened charge was true and his only intention in telling the victim was to induce the victim to take reasonable action to rectify the wrong associated with the threatened charge.

Relation to current Delaware law. Section 1403(a) and (c) directly correspond to 11 Del. C. § 791, but slightly reword the language at the beginning of Subsection (a) for greater clarity.

Section 1403(b) directly corresponds to 11 Del. C. § 792.

Comment on Section 1404. Definitions

Corresponding Current Provision(s): 11 Del. C. § 786(b)

Comment:

Generally. This section provides the definition of the term "relative" as it is used in the Chapter.

Relation to current Delaware law. Section 1404 directly corresponds to the definition of "relative" set forth in 11 Del. C. § 786(b), with one minor change. While the current definition uses the term "ancestor," the proposed definition substitutes in the term "grandparent." The term "ancestor" is ambiguous as to which degree of ancestors are included in the definition, and any ancestors further removed than grandparents are unlikely to be involved in custody disputes. For clarity, the terms currently defined in § 786(a) and (c) have been incorporated into the offense definitions to which they specific relate.

PROPERTY OFFENSES

CHAPTER 2100. THEFT OFFENSES

Section 2101. Consolidation of Theft Offenses
Section 2102. Theft by Unlawful Taking or Disposition
Section 2103. Theft by Deception
Section 2104. Theft by Extortion
Section 2105. Theft of Property Lost, Mislaid, or Delivered by Mistake
Section 2106. Theft of Services
Section 2107. Receiving Stolen Property
Section 2108. Unauthorized Distribution of Protected Works
Section 2109. Unauthorized Use of a Vehicle
Section 2110. Definitions

Comment on Section 2101. Consolidation of Theft Offenses

Corresponding Current Provision(s): 11 Del. C. §§ 840, 841(c), 841A, 841C, 846, 847(a), 849(d), 855, 939, 1450, 1451; *see also* 841B, 859, 1105

Comment:

Generally. This provision assures that the offense definitions in Chapter 2100 and the grading provisions in this Section are read together as applying to different forms of the same offense. The consolidation of theft offenses enables unified grading and defense provisions, which are included in this Section. Note that making theft a single offense does not preclude the possibility of charging multiple counts of theft.

Relation to current Delaware law. Section 2101(a) corresponds to the current consolidation provisions found in 11 Del. C. §§ 841(a) and 855(a)–(b). The purpose and function of the current provisions are maintained here, but simplified into a single Subsection. This consolidation makes § 856 unnecessary, as a conviction for either theft or receiving stolen property will result in a theft conviction, and will be graded the same in either case.

Section 2101(b) corresponds to the core grading scheme found in the current § 841(c), but changes some of the value thresholds at each grade. At the highest end of the spectrum, a grade threshold has been added for thefts of $1,000,000 or more. Currently, any theft of $100,000 or more receives identical treatment. This higher threshold recognizes the changing value of money due to inflation, the as well as the real difference in seriousness between a theft of $100,000 and a theft of ten times that value—something that could very well be achieved through some variety of white-collar crime. A $25,000 threshold has been substituted for the current $50,000 threshold to maintain a consistently material increase in value between every grade, justifying heightened punishment. Overall, the grades of theft based on amount are lower than in the current code. For example, theft of $100,000 was punishable by a minimum of 2 and maximum of 25 years' imprisonment. It is likely that the only times such a theft was punished close to its maximum was in cases with especially vulnerable victims. Such cases, however, will receive aggravated grading under the general adjustments in proposed Section 804, making large default maximum penalties unnecessary. Note that the threshold for Class 8 felony theft in

Section 2101(b)(4) is $5,000, instead of the current threshold of $1,500. The felony threshold has been raised for the reasons stated above, but to address disproportional grading in the Proposed Code. Raising a value threshold for grading effectively lowers the punishment attached to a theft of a particular amount. The legislation authorizing this Proposed Code mandates that "disproportionate" statutes be identified and rectified. The proportionality of an offense's authorized punishment is directly tied to the grade assigned to that offense. An offense's grade could be either disproportionately high *or* low. The nonpartisan consultative group supervising the drafting process for this Proposed Code has scrutinized the relative grading of all offenses, and has decided that the value threshold for felony theft is too low, leading to disproportionately high punishment when compared to other offenses of the same grade in current law. The value threshold has been changed to reflect that judgment. Note that property damage offenses already use the $5,000 threshold, lending support to the notion that $1,500 is too low for theft. As discussed in the Commentary to Section 2304, the Proposed Code uses the same value thresholds for grades of property offenses, regardless of whether the defendant takes, damages, or destroys the property. Currently, criminal mischief in 11 Del. C. § 811(b)(1) uses $5,000 as the threshold between misdemeanor and felony grades—a much higher threshold than is currently used for theft.

Piecemeal grading provisions found throughout other current theft provisions have been consolidated in Subsection (b) to the extent they are necessary. Some of those provisions are identical to the scheme in 11 Del. C. § 841(c) and need not be separately addressed in the Code. For example, § 840 (shoplifting) is graded as a Class A misdemeanor or Class G felony, depending on the value of the merchandise stolen. Identical to § 841(c), shoplifting uses $1,500 as the cut-off between the two grades.

Several specialized theft offenses in the current code do not meaningfully differ from the current *Theft by taking* or *Receiving stolen property*, except that they are graded more harshly. Instead of creating independent offenses in Chapter 2100, Section 2101(b) incorporates the grade adjustments from those provisions, but applies them to all forms of theft. Otherwise, the provisions are not retained. Those provisions are: §§ 841A (theft of a motor vehicle), though note that if the prosecution can prove that a stolen motor vehicle is worth $25,000 or more, higher grades are always available; 841C (possession or theft of a prescription form or pad); 939 (penalties for § 933, theft of computer services); 1450 (receiving stolen firearm); and 1451 (theft of a firearm). But, compare § 841A to 21 Del. C. § 6702 (receiving or transferring stolen vehicle). The latter offense grades receipt and transfer of stolen vehicles 2 levels more harshly than stealing a vehicle, even though those criminal behaviors (receipt and taking) are treated equally by the Title 11 theft offenses in the current code. Also, the grade adjustment is the only part of § 841C retained in Chapter 2100, because the rest of it is directed at drug diversion, and belongs in a separate Chapter dedicated to drug offenses.

Grade adjustments for elderly or disabled victims currently found in 11 Del. C. §§ 841(c)(1)–(2) and 846 have not been included. That is because there is now a General Part grade adjustment provision for older and especially vulnerable victims, based upon scattered Special Part grade adjustments and § 1105 (crime against a vulnerable adult), in proposed Section 804.

Finally, two additional grades of misdemeanor theft has been added in Section 2101(b)(6)–(7). Currently, all thefts valued at less than $1,500 are graded as Class A misdemeanors. This results in disproportionate maximum imprisonment and authorized fines for minor thefts, especially retail theft. Having additional grades punishes minor thefts more

equitably, creating an incentive to stop stealing. Moreover, Subsections (b)(7)-(8) that apply to instances when the value of property is less than $100, contain a special mechanism establishing an even lower grade – that of a violation – for a first offense (a similar mechanism is proposed in Sections 2304 [Criminal Damage] and 4502 [Cheating at Games and Contests], *see,* corresponding Commentary). Grading these theft offenses as violations, rather than Class A misdemeanors, represents a substantial departure from current law. Violaitons are not crimes, and no imprisonement term may be authorized for violations. This is not simply a general preference which may be included in sentencing guidelines, but rather an absolute bar to imprisonment in all cases to which the violation grade applies. Thus, the discretion of sentencing judges in these cases is limited to the amount of fine to be imposed. In addition, by authorizing only monetary penalties for even intentional theft – a truly blameworthy conduct – the proposed mechanism arguably blurs the line between civil and criminal responsibility. Besides, grading these offenses as violations imposes additional limitations. For instance, under 11 Del. C. § 1904, law enforcement officers are not authorized to arrest offenders commiting violations (a limitation that will apply to theft under Subsection (b)(8)). *See* Commentary to Section 802(a)(13). Nevertheless, Subsections (b)(7)-(8) may give a first time offender committing a minor offense a chance for a cleaner path forward, along with an incentive not to re-offend. If the offender has been convicted of a prior offense of a similar nature (including not only offenses under Section 2101, but any property or other pertinent offenses, including offenses under Section 2304 [Criminal Damage] or Section 4502 [Cheating at Games and Contests]), the rationale for grading the offense as a violation would not apply, and it would be appropriately graded as a misdemeanor.

Section 2101(c) creates a grade adjustment for extortion, rather than by separately grading it, as is the case in 11 Del. C. § 846. This way, extortion of large amounts of money will not be graded too leniently, and extortion of small amounts of money will not be graded too harshly. But in all cases, the use of coercion will net a heavier punishment for the offender.

Section 2101(d) maintains the claim of right defense to theft offenses from the current code. But, in the current code, the defense is located in § 847(a) and even though it applies to all forms of theft, it is confusingly followed by a separate, extortion-specific defense in § 847(b). Placing the claim of right defense in the consolidation section makes its general application to all theft offenses clear. Note also that the Proposed Code's claim of right defense applies only to a narrow category of cases in which a person *reasonably* believes he had a right to use or possess the property. Current law's claim of right is based on the Model Penal Code's version of that defense in § 223.1.(3)(b) that focuses on the actor's *subjective* belief that he has certain rights associated with the property. While Delaware generally adopted the Model Penal Code, it discarded many aspects of its subjectivist approach. *See, e.g.,* 11 Del. C. §§ 501–03, 511–13, 533 (punishing solicitation, conspiracy, and incomplete complicity less severely than the target offenses). The Proposed Code follows suit by adding an objective requirement to the defense, ensuring that only those who *reasonably* believe to have the right to use or possess a property could raise the defense.

Section 2101(e) incorporates some definitions that are necessary to make sense of the grade adjustments from certain current provisions. But, see the footnote to Section 2101(c)(1) for an additional matter regarding aggregation for grading.

Organized Retail Theft. 11 Del. C. § 841B (organized retail theft) has not been included in Chapter 2100. That is because every part of it is already accounted for elsewhere in the new Code. Insofar as it punishes group criminal activity, conspiracy liability in the General Part will

increase liability beyond what §841B provides. Grade adjustments for repeat offenders are dealt with in proposed Section 804 by a general adjustment that applies to all, or at least most, offenses.

Possession of Shoplifter's Tools. 11 Del. C. § 860 (possession of shoplifter's tools) has not been included in Chapter 2100. That is because the General Part will include a new inchoate offense for Possession of Instruments of Crime that will be broad enough to include this and many other, similar forms of possession.

Damage to Computer Equipment. The increased grades for damage to computer equipment, found in the current 11 Del. C. §§ 936 and 939, have not been retained in Chapter 2300. Presumably, the justification for setting a lower threshold in this case is to account for intangible losses, such as lost digital files and information. But, the method of valuing property in proposed Section 805 does take intangible losses into account, which more accurately accomplishes the aims of the current law. Therefore, separate grade thresholds are unnecessary.

Larceny of Livestock. 11 Del. C. § 859, making it a Class G felony to steal livestock, has not been retained in Chapter 2100. When the offense was first adopted in 1953, Delaware may have faced a serious threat to agriculture stemming from animal thefts, requiring harsh punishment for that activity. But, no such threat faces the State today that would justify a separate offense. Under Chapter 2100, the market value of animals stolen would be aggregated to reach the appropriate offense grade. Note that because livestock can be quite valuable, it is possible for an animal theft to receive the same grade as § 859.

Theft of Motor Vehicles. As noted above, theft of motor vehicles is treated like any other form of theft, though Section 2101(b)(4)(B) provides an absolute floor on grading of motor vehicle thefts. Note that this provision, combined with proposed Section 211 (accomplice liability) effectively covers 21 Del. C. § 6704, making that provision unnecessary. Current § 6704 makes it an offense to transfer a vehicle to another person that one knows to be stolen. This activity is essentially aiding another person to commit theft, which generates criminal liability for the person's complicity in the theft.

Comment on Section 2102. Theft by Taking or Disposition

Corresponding Current Provision(s): 11 Del. C. §§ 813, 840, 841; *see also* 11 Del. C. § 853; 31 Del. C. § 3913

Comment:

Generally. This provision defines the most straightforward form of theft: knowingly taking property that belongs to another person.

Relation to current Delaware law. Section 2102(a) corresponds to and combines current 11 Del. C. §§ 813 and 841, but with three organizational and substantive changes. First, Section 2102(a) breaks the offense into its elements for easier reading and application. Second, the culpability term "knowingly" is added to Subsection (a)(1), because the current § 841(a) does not specify a required level of culpability as to the taking. Third, the term "without consent" is added to Subsection (a)(1). Adding this term is essential to clarify the unlawful nature of the taking. The Model Penal Code's corresponding offense (§ 223.2 "Theft by *Unlawful* Taking or Disposition"), explicitly states that: "A person is guilty of theft if he *unlawfully* takes, or exercises unlawful control over, movable property of another with purpose to deprive him

thereof....” The Model Code’s commentary to § 223.2 explains that the word “unlawful” in that context implies the lack of consent. The Proposed Code reaches the same result by explicitly incorporating consent into the offense definition. Doing so also ensures that the culpability requirement of the offense will apply to this element. That is, to satisfy the offense requirements, the defendant must know that he acts without consent. Note that adding the element of consent to this provision is also consistent with current law. For instance, this element is explicitly included in 11 Del. C. § 853, a related provision dealing with unauthorized use of vehicle. *See* commentary to Section 2109 on the connection between these provisions.

Shoplifting. 11 Del. C. § 840 (shoplifting) has been abandoned in the Proposed Code as separate offense from theft because its offense definition is coextensive with theft by taking. The basic form of shoplifting requires that the actor “remove” goods from a retail establishment “with intent to appropriate” the goods, or “to deprive the owner of . . . possession thereof.” Compare that to Section 2102(a), which has a lower culpability level of “knowingly” taking, obtaining, or exerting unauthorized influence over another’s property, but with an identical intent to deprive the other person of possession. Shoplifting takes a few additional forms, but each of them is either really a form of fraud—which is incorporated into Chapter 2200—or a form of attempt liability based on concealing merchandise or tampering with labels and price tags. Attempted theft in the Proposed Code will achieve the same result. Yet, § 840 does contain a permissive inference that Section 2102(b)(1) retains because of its high probative value. Furthermore, Subsection (b)(2) creates a new permissive inference based upon the offense definitions of shoplifting in § 840(a)(4)–(5) that are similar to attempt liability.

Restitution. The restitution requirement in current § 841(d) has been relocated to Section 803(c) in the General Part. Additionally, the offenses in §§ 854 and 854A (relating to identity theft) are not incorporated into Chapter 2100, because the offense is really a form of fraud. It will be addressed in Chapter 2200.

Administrative Financial Exploitation Offense. The penalties for financially exploiting an “adult who is impaired” in 31 Del. C. § 3913(b) are already covered by the various theft provisions in Chapter 2100. Whether exploitation takes the form of extortion, deception, or exertion of unauthorized control, theft offenses can already accomplish what § 3913 sets out to do. Furthermore, the levels of grading in § 3913 based upon amount spent roughly correspond with the grading scheme in Section 2101, and those grades will automatically be increased by one level due to the victim’s status as a “vulnerable person” as defined in proposed Section 804(b). For these reasons, § 3913(b) should be eliminated as a separate offense.

Comment on Section 2103. Theft by Deception

Corresponding Current Provision(s): 11 Del. C. §§ 843, 844, 848, 849

Comment:

Generally. This provision covers situations where the offender knowingly obtains the property of another by means of trickery or falsehood, rather than by “taking” it outright, as in proposed Section 2102. Section 2103 is the general offense for fraud because the offense governs the legitimate or illegitimate processes by which an interest in property is transferred. Theft by deception is designed to regulate the methods by which the transfer of a legal interest in property is achieved. The term “deception” in Subsection 2103(d)(1) includes misrepresentations of value,

law, opinion, intention, or other state of mind, as well as certain cases where the actor knowingly takes advantage of another's misinformation, though she may not be responsible for it. There is no requirement that the deception is material, or that it would have deceived a reasonable person. It suffices for conviction that the deception was effective, whether alone or with other influences, in securing the property for the actor.

Thus, Section 2103 covers more generalized instances of fraud not covered by the more specialized Chapter 2200. Under to Subsection 2103(a), a defendant must "intentionally obtain the property of another person" by "by deceiving the other person or a third person." Theft by deception under Section 2103 requires proof of intent. The defendant must have the intent to obtain the property of another, and she must deceive the other person.

For an example of the breadth of coverage of Section 2103, consider healthcare fraud. Under current law, a defendant is guilty of healthcare fraud when she knowingly "[p]resents or causes to be presented any fraudulent health care claim to any health care benefit program." 11 Del. C. § 913A(a)(1). A fraudulent health care claim is defined as one "which is made as part of or in support of a claim or request for payment . . . when such [claim] knowingly contains false, incomplete or misleading information." 11 Del. C. § 913A(b)(1). Under current law, a defendant must knowingly deceive a health care benefit program by knowingly submitting information containing false, incomplete or misleading information with the ultimate goal of obtaining payment. Section 2103 easily covers this behavior with a generalized provision, as well as numerous other current fraud provisions.

Relation to current Delaware law. Section 2103(a) corresponds to current 11 Del. C. §§ 843 and 844, but with important structural and substantive changes. Current § 843 is *Theft by false pretenses*, and its highly specific offense definition has been converted into the definition of "deceiving" in Subsection (d)(1). Yet, Subsection (d)(1) has been broadened beyond the offense definition in current § 843 by allowing a false impression as to "any fact," rather than only "present or past" facts. These changes have two advantages. First, they simplify the offense definition in Section 2103(a). Second, they allow the combination of multiple current offenses. Current § 844, *Theft by false promise*, is made redundant because any false promise to do something in the future is a "fact" covered by Subsection (d)(1). Additionally, the definitions of "obtain," "property of another," and "deceive" are broad enough to make the offense definitions of the current §§ 848 (misapplication of property) and 849 (theft of rented property) redundant.

Finally, the phrase "or a third person" is not found in the current offense definitions. It has been added to Subsection (a)(2) to capture situations where the offender deceives a person to whom property has been entrusted, but who is not the true owner of the property obtained.

Section 2103(b) retains provisions regarding inferences from the current offenses. Subsection (b)(1) corresponds to the permissive inference and explanatory provisions in the current § 849(b)–(c). Yet, whereas § 849(b) permits the finder of fact to "presume intent to commit theft," Subsection (b)(1) permits it to "infer the deception required" by the offense definition. Subsection (b)(2)(A) directly corresponds to 11 Del. C. § 844. Subsection (b)(2)(B) has been added to account for common situations where businesses commit fraud against clients, but claim they merely breached a contract without intent to defraud. Home improvement fraud is the most common scenario to which this provision applies. Because many fraud provisions in current law are subsumed by Section 2103, this is the only place where an exception to this general rule can be located. *See* General Commentary to Chapter 2200.

Section 2103(c) directly corresponds to the current § 849(e), with a minor change. Whereas § 849(e) creates for lessors and renters a defense against "prosecution for theft,"

Subsection (c) specifies that it is a defense specifically against theft by deception. This has been added to recognize the fact that subsequent theft of property that has been properly leased or rented will always fall under theft by deception.

Embezzlement. Note that the current Delaware Code does not have an embezzlement offense. Presumably, such behavior would nevertheless fall under Section 2103.

Comment on Section 2104. Theft by Extortion

Corresponding Current Provision(s): 11 Del. C. §§ 846, 847(b)

Comment:

Generally. This provision covers situations where the offender obtains another person's property by means of a threat rather than by outright taking (Section 2102) or deception (Section 2103).

Relation to current Delaware law. All of Section 2104 corresponds directly to the current §§ 846 and 847. There are a few notable changes. A defense for theft based on claim of right has been moved out of theft by extortion, as it was in § 847(a), and into Section 2101(d). Additionally, although the current § 841 says that extortion is a consolidated form of theft and subject to its unified grading scheme, § 846 treats extortion as though it is a separate offense from theft, particularly by grading it more harshly. This probably reflects the fact that extortion is a combined offense (theft + threat), and therefore the higher grade is translated into a grade adjustment in Section 2101(b). This increases the severity of punishment due to the use of threats. Finally, the wording of subsection (a) is different from § 846. § 846 includes an "intent" to deprive, that that "the person compels or induces another person to deliver property to the person or a third person" by threat. Subsection (a) ignores the issue of to whom the property is delivered, since the victim is deprived of his property—and the offense elements are satisfied—regardless of precisely who receives the property extorted.

Most notably, the enumerated types of threats forming the basis of extortion have been replaced with reference to the criminal coercion statute. Those statutes are worded identically. Incorporating that provision by reference will both enable more consistent interpretation and application of the two offenses, and make clear that coercion is a lesser-included offense to extortion.

Comment on Section 2105. Theft of Property Lost, Mislaid, or Delivered by Mistake

Corresponding Current Provision(s): 11 Del. C. § 842

Comment:

Generally. This provision defines as theft the unlawful retention of property that the possessor knows to belong to someone else.

Relation to current Delaware law. Section 2105 is very similar to the current § 842, but with three minor changes. First, the offense definition is broken into its elements for easier reading and application. Second, the phrase "comes into possession" is substituted for the current

language, "exercises control over," which made the offense too similar to *Theft by unlawful taking or disposition*.

Comment on Section 2106. Theft of Services

Corresponding Current Provision(s): 11 Del. C. §§ 845, 933; *see also* § 850

Comment:

Generally. This provision makes clear that, as with other forms of property, it is theft to obtain unlawfully another person's labor or services.

Relation to current Delaware law. Section 2106(a) corresponds to and combines 11 Del. C. §§ 845(a) and 933, with some minor structural changes. The offense definition is broken up into its elements for easier reading and application. The term "without consent" is added to Subsection (a)(1), to clarify the unlawful nature of the taking. *See* commentary to Section 2102. Most importantly, the methods of obtaining services in Subsection (a)(2) are broken up into two categories visually. Although those categories are not mutually exclusive, they reflect the fact that there are two different kinds of services that can be stolen under this Section: personal services and utility-type services. One is more likely to be stolen by deception, while the other is more likely to be stolen through unlawful physical access.

Section 2106(b) corresponds to the rebuttable presumptions and exception in the current § 845(b)–(c); but, the presumptions have been converted into permissive inferences. That change was made because of concerns that the rebuttable presumptions that currently exist unconstitutionally shift the burden of proof onto the defendant. Additionally, Subsection (b)(1) attempts to simplify the old presumptions into a single provision, though it retains two distinct inferences.

Theft of Telecommunication Services. Note that § 850 (use, possession, manufacture . . . unlawful telecommunication and access devices) has not been included in Chapter 2100, for several reasons. First, all the substantive provisions of § 850(a) are already captured by other Sections of the Proposed Code. Theft of services is captured by Section 2106 [Theft of Services]. Possession of devices or materials with intent to steal telecommunication services is captured by inchoate offenses and accomplice liability in the General Part, as well as the new Section 708 [Possessing Instruments of Crime]. Concealing information about telecominication devices from lawful authorities in order to use them for the commission of an offense is captured by Section 3301 [Obstructing Justice]. Note also that inchoate and accomplice liability will increase punishment for theft of services in a manner similar to the increased grading scheme of § 850 compared to theft of services.

Because all substantive provisions in § 850 are covered by the Proposed Code's General Part and specific offenses, § 850(e) (definitions) is unnesessary and not retained. Moreover, the specific procedural provisions in § 850(b)-(d) (criminal penalties, venue and civil action) cannot be retained. There is no basis in current law to broaden the application of these particularized provisions to the more general theft of services, possession of instruments of crime or obstruction of justice offenses. On the other hand, retaining these provisions in Title 11 and restricting them to their current field of application, would require the creation of special carve-outs for "communication services" from the abovementioned offenses in the Proposed Code.

Because the creation of such special carve-outs is anthithetical to the Proposed Code's goal of consolidation, these procedural provisions are not retained.

Comment on Section 2107. Receiving Stolen Property

Corresponding Current Provision(s): 11 Del. C. §§ 851, 852; *see also* 852A, 1450

Comment:

Generally. This provision punishes the intent to deprive another person of property, whether or not the offender actually stole that property, by governing receipt and possession of stolen property.

Relation to current Delaware law. Section 2107(a) corresponds to 11 Del. C. § 851, but with one change. Subsection (a)(3) has been substituted for the current requirement that the offender have the "intent to deprive the owner." This change is made because the intent to deprive is already implicit in Subsection (a)(1)–(2), except in the situation present in (a)(3). In this way, the new offense definition is more precise.

Section 2107(b) directly corresponds to the presumptions in 11 Del. C. § 852.

Receiving Stolen Firearms. The criminal act described in 11 Del. C. § 1450 (receiving stolen firearm) is redundant with Section 2107; but, a grade adjustment based upon that provision is included in Section 2101(b).

Consolidation. Receiving stolen property has been consolidated with other forms of theft to both unify grading and make clear that a person could not be convicted of both theft and receiving stolen property based upon the same act. Yet, to avoid confusion, Section 2107(a) does not label the offense as a form of theft.

Selling Stolen Property. Note that § 852A has not been included in Chapter 2100, for two reasons. First, the criminal acts that must be proved in § 852A are identical to § 852 (receiving stolen property), so it need not be a separate offense. Second, current § 852A has not been included to make clear that a defendant cannot be convicted of both theft and selling stolen property based on the same act.

Comment on Section 2108. Unauthorized Distribution of Protected Works

Corresponding Current Provision(s): 11 Del. C. §§ 858, 920

Comment:

Generally. This offense criminalizes the unauthorized distribution of copyrighted materials. The offense attempts to strike a balance between two competing concerns. On one hand, copyright holders are deprived of income when their works are illegally copied and distributed for free. This loss is akin to theft, which is why this offense is located in Chapter 2100. On the other hand, the ease of distributing copyrighted works to multitudes of anonymous recipients on the Internet makes it possible for a single act of uploading a work to be construed as thousands of "distributions." Disproportionate punishment could easily result in that case.

Therefore, while Section 2108 makes unauthorized distribution of any copyrighted work a general offense, its grading is limited by the number of recipients of the work.

Relation to current Delaware law. Current Delaware law has no general offense criminalizing unauthorized distribution of copyrighted materials. Instead, Delaware has a few outdated offenses dealing with specific kinds of copyright infringement. 11 Del. C. § 858 criminalizes use of recording equipment inside a movie theater, but does not address any other forms of unauthorized duplication, and fails to account for visual works other than films. 11 Del. C. § 920 criminalizes unauthorized transfer of any recorded sounds, but requires that the transfer be made with intent to sell the copy. Today, there is no "market" for pirated films, music, or television: everything is shared for free on the Internet.

Section 2108 attempts to generalize unauthorized duplication and distribution for all copyrighted works. Yet, the desirability of generally criminalizing this behavior is controversial, and may not be a step Delaware wants to take at this time. If that is the case, then Section 2108 should not be included with the Proposed Code. In either case, 11 Del. C. §§ 858 and 920 should not be retained, because they are outdated and lead to disproportional punishment of select copyright infringers without touching others.

Comment on Section 2109. Unauthorized Use of a Vehicle

Corresponding Current Provision(s): 11 Del. C. § 853; *see also* 21 Del. C. § 6702

Comment:

Generally. This provision defines as a criminal offense the use or retention of a vehicle without consent. Section 2108 covers cases where the offender lacks the intent to permanently deprive the owner of the vehicle and therefore has not committed theft.

Relation to current Delaware law. Section 2108(a) corresponds almost directly to 11 Del. C. § 853, with two changes. First, Subsection (a)(1) omits the activities of "taking" or "exercising control over" the vehicle, both because those activities are confusingly similar to theft by taking, and because to the extent they are different from theft by taking, are not meaningfully different from "operating" the vehicle. Note, however, that the current offense does include "rides in" as prohibited activity, raising the question as to whether a mere passenger could commit this offense.

Second, 11 Del. C. § 853(4) has not been included, because that subsection prohibits transfer of a vehicle or a responsibility for paying a debt when the person knows that the vehicle is the primary security for a debt owed to a creditor. This activity is really a form a fraud, and will therefore be more properly addressed in Chapter 2200.

Section 2108(b) retains the same grade as 11 Del. C. § 853. Yet, note the existence of a regulatory motor vehicles offense that is functionally identical to § 853, 21 Del. C. § 6702 (driving vehicle without consent of owner). The regulatory offense is defined much more simply than § 853, and its punishment is equivalent to what we are calling a Class C misdemeanor—two grades lower than § 853. Note also that § 6702 predates § 853 by more than forty years (1929 vs. 1972).

Defined Terms. Note that the terms "motor vehicle, airplane, vessel or other vehicle" are used here, whereas 11 Del. C. § 841A (theft of a motor vehicle) uses and defines only the term

"motor vehicle." The Proposed Code uses more encompassing definitions to capture broader forms of unauthorized use, particularly those concerning aircraft and vessels.

Comment on Section 2110. Definitions

Corresponding Current Provision(s): 11 Del. C. §§ 813, 841A, 841C, 843, 857, 931, 933

Comment:

Generally. This Section provides definitions of key terms used in this Chapter.

Relation to current Delaware law. Section 2110(a) provides a definition of "dealer" that corresponds to the definition currently found in 11 Del. C. § 857(2).

Section 2210(b) provides a definition of "deceiving" that is based on the theft offense currently found in 11 Del. C. § 843. The definition of "deceiving" has been broadened beyond the offense definition in current § 843 by allowing a false impression as to "any fact," rather than only "present or past" facts, which simplifies the offense definition in Section 2103(a) and allows the combination of multiple current offenses.

Section 2110(c) provides a definition of "deprive" that corresponds to the definition currently found in 11 Del. C. § 857(3).

Section 2210(d) provides a definition of "motor vehicle" that corresponds to the definition currently found in 11 Del. C. § 841A(b)

Section 2110(e) provides a definition of "obtain" that corresponds to the definition currently found in 11 Del. C. § 857(4). But, because 11 Del. C. definition does not specify a meaning in relation to *services*, that additional meaning has been added for clarity based upon Model Penal Code § 223.0(5).

Section 2110(f) provides a definition of "owner" that corresponds to the definition currently found in 11 Del. C. § 857(5). The definitions of "owner" has been changed to make clear that illegally obtained property can be stolen, and thus give rise to criminal liability. The change is based on current § 841(b).

Section 2210(g) provides a definition of "practitioner" that corresponds to the definition currently found in 11 Del. C. § 841C(b)(1).

Section 2110(h) provides a definition of "property of another" that corresponds to the definition currently found in 11 Del. C. § 857(7). Like the definition of "owner," the definition of "property of another" has been changed to make clear that illegally obtained property can be stolen, and thus give rise to criminal liability. The change is based on current § 841(b). Additionally, the definition of "property of another" expands upon the current definition in § 857(7) by doing two things. First, it acknowledges that legal persons can be victims of theft. Second, it makes it possible to accomplish the purpose of current § 813 (theft from a cemetery) without creating an additional offense, by saying that property left at a cemetery is not abandoned property.

Section 2107(i) provides a definition of "receive" that has been added anew, as it is not defined in the current statutes.

Section 2110(j) provides a definition of "service" that corresponds to the definitions in 11 Del. C. §§ 857(8) and 931(6). Specifically, "computer services" are added to the definition of "services." By so doing, the separate offense in 11 Del. C. § 933 (theft of computer services) is rendered unnecessary.

Section 2110(k) provides a definition of "stolen" that has been added anew, as it is not defined in the current statutes.

Section 2110(l) states that the "value" of property is calculated as provided in Section 805.

CHAPTER 2200. FORGERY AND FRAUDULENT PRACTICES

Section 2201. Forgery and Counterfeiting
Section 2202. Fraudulent Tampering with Records
Section 2203. Fraudulent Treatment of Public Records
Section 2204. Issuing a Bad Check
Section 2205. Unlawful Use of a Payment Card
Section 2206. Deceptive Business Practices
Section 2207. Defrauding Secured Creditors
Section 2208. Fraud in Insolvency
Section 2209. Identity Theft
Section 2210. Commercial Bribery
Section 2211. Fraudulent Conveyance or Receipt of Public Lands
Section 2212. Unauthorized Impersonation
Section 2213. Definitions

General Comment on Chapter 2200

Corresponding Current Provision(s): 11 Del. C. §§ 840, 908, 913, 913A, 916, 917, 918, 920, 921, 923, 924, 924A; 6 Del. C. § 4903A; 12 Del. C. § 210; 21 Del. C. §§ 6708, 6710; 31 Del. C. § 1003

Comment:

Ticket scalping. 11 Del. C. § 918, criminalizing ticket scalping, has not been included in the Proposed Code because it is not an offense of general application relating to all ticket resales. The offense prohibits selling, reselling, or exchanging any tickets to events occurring at only two specific venues in Delaware. If these provisions are to be retained, they should be relocated to a regulatory title dealing with entertainment venues, due to their highly specialized application.

Transfer of recorded sounds. 11 Del. C. §§ 920 and 921, concerning the transfer of recorded sounds, will be replaced by proposed Section 2108. Under Delaware law, individuals cannot appropriate recorded "sounds" for purposes of profit without the consent of the sounds' owner. Proposed Section 2108, criminalizing the unauthorized distribution of protected works, encompasses existing Delaware provisions 11 Del. C. §§ 920 and 921; the definition of "distribute" in proposed Section 2108(d)(1), which includes "mak[ing] available [protected works]," is broad enough to include advertising or offering to sale or resell protected works.

11 Del. C. §§ 923, 924, 924A have not been included in the Proposed Code because these provisions are essentially regulatory provisions defining the class of exceptions, the rights of parties in civil litigation, and forfeiture proceedings. They are not included in Chapter 2200 because the exceptions and forfeiture provisions are not necessary in light of the way the offense provisions in Chapter 2200 are drafted, and civil litigation is not properly addressed in a criminal code.

Shoplifting. 11 Del. C. § 840(a)(2) criminalizes the possession of any goods by charging them to another person without that person's authority, or by charging them to a fictitious person. Although the use of a fictitious person or the fraudulent charging of merchandise to

another without their permission is fraudulent, the proposed theft by deception offense in Section 2103 is broad enough to include situations where the offender knowingly obtains the property of another by means of this type of fraud. Therefore, § 840(a)(2) need not be included in Chapter 2200.

Theft by deception. Proposed Section 2103, the provision for theft by deception, concerns situations where the offender knowingly obtains the property of another by means of trickery or falsehood. Many of the current fraud provisions are adequately addressed through the broad language of Section 2103. These include: insurance fraud, 11 Del. C. § 913; health care fraud, 11 Del. C. § 913A; home improvement fraud, 11 Del. C. § 916; new home construction fraud, 11 Del. C. § 917; auto repair fraud, 6 Del. C. § 4903A; and welfare fraud, 31 Del. C. § 1003. All of these frauds involve the use of deception to obtain an unearned benefit from another, and are therefore properly characterized as theft offenses.[11]

Concealment or alteration of a will. 11 Del. C. § 908 and 12 Del. C. § 210 concerns the concealment, alteration, theft, or destruction of a will. These offenses, like many others, are adequately addressed by proposed Section 2103, theft by deception. Because the most logical reason that one would conceal, alter, steal, or destroy a will is to cause someone to take more from the testator than he or she would otherwise be entitled to, the conduct prohibited by 12 Del. C. § 210 is better addressed by the theft by deception offense in proposed Section 2103.

Possession of blank titles and registration cards. 21 Del. C. §§ 6708 and 6710, criminalizing the possession of blank titles and registration cards, have not been included in Section 2200. Assuming that blank titles and registration cards are intended to be used for a criminal purpose, 21 Del. C. §§ 6708 and 6710 are adequately covered by proposed Section 708's general inchoate offense of possession of instruments of crime. Although the current offenses prohibit mere possession of blank titles and registration cards, adding an intent requirement is justifiable because the harm arises when the items are used or are intended to be used to commit a future offense, such as facilitating the sale of stolen cars. The act of possessing blank titles and registration cards is not harmful in itself.

Comment on Section 2201. Forgery and Counterfeiting

Corresponding Current Provision(s): 11 Del. C. §§ 861, 926; 21 Del. C. §§ 2316, 2751, 2760, 6705, 6709.

Comment:

Generally. This provision creates the broadest formulation of a general forgery and counterfeiting offense. This Section was derived from various distinct offenses whose consolidation provides unified grading and definition provisions. Like other offenses prohibited in Chapter 2200, forgery is typically performed for the purpose of consummating a theft. Section 2201 treats forgery as an independent offense, however, recognizing that: (1) forged writings are often used to accomplish especially far-reaching fraudulent activities, and (2) beyond the specific theft achieved or attempted, forgery imposes the additional discrete harm of reducing public

[11] Although nearly all frauds can be considered theft by deception in a sense, the Proposed Code follows both traditional practice and current Delaware law by separating most common forms of fraud into a separate Chapter dealing with fraud offenses.

confidence in the forged item (for example, counterfeiting, which is one form of the Section 2201 offense, tends to undermine trust in paper currency and the monetary system).

Relation to current Delaware law. Section 2201(a) corresponds to current 11 Del. C. §§ 861(a)(1), (a)(2), and 926. Section 2201(a)'s comprehensive formulation consolidates and replaces various scattered offenses, including: the general forgery offense (11 Del. C. § 861), trademark counterfeiting (11 Del. C. § 926), the forgery or fraudulent alteration of vehicle identification documents (21 Del. C. §§ 2316, 6705, 6709), and the forgery or fraudulent alteration of driver's licenses or identification cards (21 Del. C. §§ 2751, 2760).

Subsections (a)(1) and (a)(2) correspond to 11 Del. C. §§ 861(a)(1) and (a)(2), respectively. Subsection (a)(3) is a new provision: the phrase "puts forward" should be interpreted broadly and is intended to cover situations where one uses a forged writing, but does not necessarily dispose of it, such as by displaying it.

Subsection (a)(4) corresponds to 11 Del. C. § 926(a) (trademark counterfeiting), except that the provision does not criminalize "offer[ing to sell]" or "possess[ing] with intent to sell or distribute" any item or service bearing or identified by a counterfeit mark. The omitted language concerns conduct that is more preliminary than actual forgery or counterfeiting and is therefore more appropriately covered under attempt liability in proposed Section 701.

Section 2201(b) introduces three separate levels of grading depending on the nature of the written instrument: Class 7 felonies for issues of money, stamps, securities, or other valuable instruments issued by the government; or part of an issue of stock, bonds, or other instruments representing interests in or claims against any property or enterprise (Subsection (b)(1)); Class 8 felonies for deeds, wills, codicils, contracts, releases, assignments, commercial instruments, checks, or other instrument evidencing, creating, transferring, terminating, or otherwise affecting a legal right, interest, obligation, or status (Subsection (b)(2)); and Class A misdemeanors for all other cases (Subsection (b)(3)). The grading of Subsection (b)(1) corresponds to 11 Del. C. § 861(b)(1), except that the grading has been elevated to a Class 7 felony. The grading of Subsection (b)(2) corresponds to 11 Del. C. § 861(b)(2), except that the grading has been altered to a Class 8 felony, which is the lowest felony grade in the Proposed Code, to achieve consistency between current law and the proposed grading scheme. The grading of Subsection (b)(3) corresponds to 11 Del. C. § 861(b)(3). Provisions concerning grading adjustments made for second or subsequent offenses have been omitted from this Section, as Section 805 applies them generally to all offenses in the Proposed Code.

Comment on Section 2202. Fraudulent Tampering with Records

Corresponding Current Provision(s): 11 Del. C. §§ 840A, 871, 872, 876, 877, 878, 909; 31 Del. C. § 1004

Comment:

Generally. This provision criminalizes both fraudulently tampering with records and inviting reliance on records one knows to have been fraudulently tampered with. Section 2202 supplements proposed Section 3203 and applies to records that may not qualify as "public records."

Relation to current Delaware law. Section 2202 corresponds to and consolidates numerous existing offenses: 11 Del. C. § 840A(a) (the fraudulent creation or alteration of retail

sales receipts); 11 Del. C. § 871 (falsifying business records); 11 Del. C. § 872 (the affirmative defense for employees who merely executed the orders of an employer); 11 Del. C. § 876 (tampering with public records); 11 Del. C. § 877 (offering a false instrument for filing); 11 Del. C. § 878 (issuing a false certificate); 11 Del. C. § 909 (securing execution of documents by deception); and 31 Del. C. § 1004 (tampering with documents to be filed with public assistance programs).

Because Section 2202 is a consolidated provision, the offense is meant to broadly capture conduct. Section 2202 does not distinguish between categories of documents, whether they are for public or private use; instead *all* "records" are captured under Section 2202. Subsection (a)(1) prohibits tampering with or failing to properly maintain records and corresponds to offenses like tampering with business records, tampering with public records, and presenting false reports to public assistance programs.

Section 2202(a)(2) prohibits issuing, offering, or presenting an instrument that contains false statements or false information. Subsection (a)(2) covers such documents and offenses like illegitimate sales receipts, offering a false instrument for filing, issuing a false certificate, and securing execution of documents by misrepresenting the nature of the document.

Section 2202(b) sets the grading level for this offense at a Class 8 felony. Current Delaware law assigns different grades depending on the nature of the document. For instance, issuing a false certificate is a Class G felony, false business records are a Class A misdemeanor, and tampering with public records is a Class E felony. Instead of attempting to delineate every kind of document for which there is a different grading level, Section 2202(b) unifies and consolidates the offense as a Class 8 felony, which is appropriate because of the relatively strict offense requirement that the defendant have the intent to defraud.

Note that the affirmative defense for employees found in 11 Del. C. § 872 has not been retained. An employee acting under orders of a superior is unlikely to have the "*intent* to defraud" required by the offense definition, making an affirmative defense unnecessary. Furthermore, an employee who does meet the intent requirement does not deserve to be shielded from liability simply because her employer-superior shares her intent to defraud.

Comment on Section 2203. Fraudulent Treatment of Public Records

Corresponding Current Provision(s): 21 Del. C. §§ 2751(a)-(p), 6705(d), 6709

Comment:

Generally. Section 2203 criminalizes fraudulently obtaining, displaying, or possessing an official document. This provision is similar to, but conceptually distinct from, Section 2202.

Relation to current Delaware law. Section 2203 is meant to capture several circumstances not included in Sections 2201 and 2202: (1) where individuals may have fraudulently procured official documents, but may not have necessarily offered false information or forged any of the documents (*See* 21 Del. C. § 2751(f) "A person shall not display, cause or permit to be displayed, any fictitious license or identification card"); and (2) where individuals display, possess, or refuse to surrender fraudulent documents. *See* 21 Del. C. § 2751(o) ("A person shall not fail or refuse to surrender to the Department on its lawful demand any license or identification card that has been suspended, revoked, canceled, altered or otherwise fraudulently obtained.").

Section 2203(b) sets the grade of this new offense as a Class A misdemeanor. This grade is not based on the current provisions that are being consolidated. (Current § 2751 is graded as a Class B misdemeanor or a violation, depending on the circumstances of the offense; § 6705(d) is graded as a misdemeanor; and § 6709 is graded as a Class E felony.) The Class A misdemeanor grade of Section 2203(b) has been adopted: (1) for consistency in consolidating currently separate offenses, and (2) to establish a proportional grade when compared to the more serious offenses in Section 2202. A defendant who violates Section 2203 is guilty of fraudulently obtaining an official document or displaying, possessing, or refusing to surrender fraudulent documents, but is not guilty of tampering with or offering fraudulent information.

Comment on Section 2204. Issuing a Bad Check

Corresponding Current Provision(s): 11 Del. C. §§ 900, 902; *see also* 900A

Comment:

Generally. This provision criminalizes the issuing or passing bad checks. Although they are often used as a means of avoiding paying for property or services, bad checks cause additional harm not addressed by Chapter 2100's theft offenses: they disrupt ordinary commerce by being negotiated by the payee and subsequent holders for value, and they undermine the public's confidence in checks and the checking system generally.

Relation to current Delaware law. Section 2204 corresponds to large portions of 11 Del. C. §§ 900 and 902. Section 2204(a), the offense definition, corresponds to 11 Del. C. § 900(a). 11 Del. C. § 900(b), authorizing law enforcement to refuse to investigate instances of issuing a bad check when a commercial entity fails to ask for and record personal identifying information, has not been included. Authorizing law enforcement to refuse to investigate violations of § 900 due to the mistake or vulnerability of a commercial entity effectively exculpates the offender for reasons unrelated to the offender's wrongdoing or blameworthiness. This is likely the only instance of such an authorization in the current criminal code, making it a singular and material deviation from general principles.

Section 2204(b) correspond in part to the grading scheme in 11 Del. C. § 900. But, the grade of the offense, based upon the value of the check involved, is set according to the grade thresholds in Section 2101(b) for theft offenses. Because fraud is a species of theft, it promotes consistency and proportionality in the Proposed Code for all fraud and theft offenses, as much as possible, to be graded in the same way. This change makes available additional felony and misdemeanor grades, allowing more nuanced grading based on the seriousness of the offense.

Section 2204(c) provides the trier of fact with a permissive inference regarding the issuer of a bad check's knowledge when either of two factors are met. Section 2204(c) corresponds to 11 Del. C. § 900(a), with two minor changes. First, § 900(a) frames the permissive inference factors as providing prima facie evidence of the issuer's knowledge, rather than merely providing the trier of fact with a permissive inference. The change from providing prima facie evidence to providing a permissive inference follows the general practice of the Proposed Code, as laid out in proposed Section 106(d). Second, the language excluding cases involving postdated checks, which in § 900(a) applies to both of the section's prima facie evidence factors, now only applies to the second factor (Section 2204(c)(2)). Proposed Section 2204(c)(1) does not retain the exception for cases involving postdated checks currently contained in § 900(a) because the trier

of fact should be allowed to infer that an issuer knew the bad check would not be honored if the issuer had no account with the drawee at the time the check was issued. Generally, an issuer cannot issue a postdated check if the issuer does not have an account with a drawee bank at the time the check was issued, although one could do so if the drawee account existed previously but was closed by the time the postdated check was issued. Because the issuer of the bad postdated check would know, by definition, that the check would not be honored because the issuer had no account with the drawee at the time the check was issued, but such knowledge would be difficult for the State to prove, a permissive inference is appropriate.

Current Provisions Not Included. 11 Del. C. § 900A, concerning conditional discharges for first-time offenders, has not been included in Section 2204 as it concerns criminal procedure, and should be relocated to a portion of the Delaware Code dealing in procedure. The affirmative defense for employees acting as agents, in 11 Del. C. § 902, has not been retained, either. An employee who issues a check at the behest of her employer is unlikely to know that the check will not be honored, making the affirmative defense unnecessary.

Comment on Section 2205. Unlawful Use of a Payment Card

Corresponding Current Provision(s): 11 Del. C. §§ 903, 905

Comment:

Generally. This provision criminalizes the unlawful use of payment cards, including credit and debit cards. Payment cards are often fraudulently used for the purpose of wrongfully acquiring property. Nevertheless, payment card fraud creates harm not addressed by Chapter 2100's prohibitions against theft. As is the case with passing bad checks, payment card fraud undermines confidence in payment systems and is harmful to the ordinary operation of commerce.

Relation to current Delaware law. Section 2205(a) is substantially similar to 11 Del. C. § 903, but with four changes. First, § 903(b)(1) has been omitted. "Making" or "possessing" an unlawful payment card is an inchoate offense covered by Section 700, while "selling," "giving," or "transferring" an unlawful payment card is properly covered by general principles of accomplice liability. Second, § 903(b)(2) (publishing a payment card or code) has not been included as that provision is also covered by the general accomplice liability principles in proposed Section 211. Third, § 903(e) (procedures for prosecution) has not been included as it concerns criminal procedure, and should be relocated to a portion of the Delaware Code dealing in procedure. Fourth, the culpability requirements have been heightened from § 903(a)'s "knowingly permit[ting] or encourage[ing] another to use a payment card for the purpose of obtaining money" to the proposed provision's "intent to obtain property or services." The alteration also expands the offense by broadening what can be obtained to satisfy the offense definition.

Sections 2205(a)(1) through (a)(3) correspond to current §§ 903(a)(1) through (a)(4). Subsection (a)(3) is a consolidation of current §§ 903(a)(2) and (a)(4).

Sections 2205(b)(1) corresponds in part to 11 Del. C. § 903(c). But, the grade of the offense, based upon the amount of property obtained by unlawful use of the payment card, is set according to the grade thresholds in Section 2101(b) for theft offenses. Because fraud is a species of theft, it promotes consistency and proportionality in the Proposed Code for all fraud and theft

offenses, as much as possible, to be graded in the same way. This change makes available additional felony and misdemeanor grades, allowing more nuanced grading based on the seriousness of the offense. The grade provisions involving victims over 62 years of age have not been included in Section 2205 because Section 804 contains a general grade adjustment for "vulnerable persons," including persons over 62 years of age, that applies to all offenses. The aggregation provision, including Subsection (b)(2), corresponds to current § 903(d).

Note that the affirmative defense in 11 Del. C. § 905, for defendants who have the intent and ability to meet obligations to the issuer that arise out of the defendant's unlawful use of a payment card has not been retained.

The harm of the offense is completed at the time the payment card is used; any repayment after the offense is restitution, which is not related to blameworthiness or criminal liability. Furthermore, as a practical matter, the defendant's ability to pay will likely be the only evidence of intent to pay, making the affirmative defense available only to defendants of means.

Comment on Section 2206. Deceptive Business Practices

Corresponding Current Provision(s): 11 Del. C. §§ 906, 922

Comment:

Generally. This provision criminalizes several common deceptive business practices that operate to cheat others. Section 2206 supplements Chapter 2100's theft offenses by prohibiting inherently deceptive conduct that, even under proposed Section 701's "substantial step" test, may not constitute attempted theft. Section 2206 removes any doubt that these practices are criminal, and addresses them in a single provision to ensure they are defined and graded consistently.

Relation to current Delaware law. Section 2206 criminalizes a variety of deceptive business practices and the improper labeling of products for sale. Section 2206 corresponds, in large part, to 11 Del. C. §§ 906 and 922. Current § 906 is the general deceptive business practices provision and § 922 is the provision prohibiting the improper labeling of sound recordings.

Section 2206(a) is substantially similar to 11 Del. C. § 906. The conduct requirements in Subsections (a)(1) through (a)(7) correspond to 11 Del. C. §§ 906(1) through (7), respectively. Yet, three minor changes have been made. In Subsection (a)(1), the "possesses for use" language found in § 906(1) has not been included because possession of instruments of crime is separately covered by the newly proposed general inchoate offense in Section 708. Second, the "knowingly or recklessly" culpability requirement that applies to all of current § 906 has not been retained because each individual subsection comprising Section 2206(a) contains its own individual culpability requirement. Third, Subsection (a)(3) omits the "attempts to take" language found in § 906(3) because attempt liability is covered by the inchoate provisions in proposed Section 701.

The republication exception in Section 2206(b) corresponds to the exception in 11 Del. C. § 906. That provision provides an exception to criminal prosecution for the publication, broadcast, or reproduction of material by those engaged in the dissemination of information without knowledge of the material's deceptive character.

The grading scheme in Section 2206(c) has been set according to the grade thresholds in Section 2101(b) for theft offenses. Because fraud is a species of theft, it promotes consistency and proportionality in the Proposed Code for all fraud and theft offenses, as much as possible, to

be graded in the same way. This change makes available additional felony and misdemeanor grades, allowing more nuanced grading based on the seriousness of the offense, when compared to 11 Del. C. § 906 (Class A misdemeanor) and 11 Del. C. § 922 (Class G or F felony).

Comment on Section 2207. Defrauding Secured Creditors

Corresponding Current Provision(s): 11 Del. C. §§ 853, 891, 893, 910

Comment:

Generally. This provision criminalizes dealing with property for the purpose of hindering a secured creditor's interest in the property. Section 2207 will often apply to debtors who fraudulently deal with collateral in their rightful possession. Section 2207 complements proposed Chapters 2100 and 2300; the definition of "property" makes it so that a defendant's own interest in property that is subject to a security interest will not preclude liability for theft or property damage. Section 2207 independently addresses security interests for those cases in which the debtor does not appropriate or damage the collateral or satisfy another requirement of a theft or property offense, but does unlawfully hinder enforcement of the security interest.

Relation to current Delaware law. Section 2207(a) prohibits destroying, removing, concealing, encumbering, transferring, or otherwise dealing with property subject to a security interest with the intent to hinder the enforcement of that interest. Section 2207 corresponds, in large part, to 11 Del. C. § 891, except that "hinder" has been used instead of the current "defeat" language, thereby broadening the offense. This change is intended to cover situations where a person seeks to delay enforcement of a security interest, but not defeat it altogether. Such persons should not escape liability.

Section 2207, with its expanded coverage, also incorporates 11 Del. C. § 853(4) (the unlawful possession and transfer of a vehicle to a third party, without regard to the existence of creditors who are entitled to receive payments on a debt where the vehicle is a security); 11 Del. C. § 893 (the alteration or destruction of levied-upon property that a person knows has been levied upon or seized under execution, attachment process, or distress for rent); and 11 Del. C. § 910 (an unlawful debt adjustment to deprive creditors of collections).

Section 2207(b) sets the offense grading scheme according to the grade thresholds in Section 2101(b) for theft offenses. Because fraud is a species of theft, it promotes consistency and proportionality in the Proposed Code for all fraud and theft offenses, as much as possible, to be graded in the same way. This change makes available additional felony and misdemeanor grades, allowing more nuanced grading based on the seriousness of the offense, when compared to 11 Del. C. §§ 891, 853, 893 (Class A misdemeanors), and 910 (Class B misdemeanor).

Comment on Section 2208. Fraud in Insolvency

Corresponding Current Provision(s): 11 Del. C. § 892

Comment:

Generally. This provision criminalizes fraudulent conduct by one who knows that certain proceedings for the benefit of creditors, such as liquidation proceedings or proceedings seeking the appointment of a receiver, have been or are about to be instituted.

Relation to current Delaware law. Section 2208 incorporates, in large part, 11 Del. C. § 892, except that Section 2208(a)(2) allows the fraud to have occurred when the offender knows that proceedings have been or about to be instituted, rather than once a receiver has been appointed or a liquidation has been made. The rationale for the change is that one motivated to commit the fraud might not wait until the appointment or disposition has already been made, but might act quickly and prospectively. The intent requirements of Subsection (a)(1) corresponds to that of current § 892. Subsection (a)(3)(A), (a)(3)(B), (a)(3)(C), and (a)3)(D) correspond to current §§ 892(1), 892(2), 892(3), and 892(4), respectively.

Section 2208(b) sets the offense grade according to the grade thresholds in Section 2101(b) for theft offenses. Because fraud is a species of theft, it promotes consistency and proportionality in the Proposed Code for all fraud and theft offenses, as much as possible, to be graded in the same way. This change makes available additional felony and misdemeanor grades, allowing more nuanced grading based on the seriousness of the offense, when compared to 11 Del. C. § 892 (Class A misdemeanor).

Comment on Section 2209. Identity Theft

Corresponding Current Provision(s): 11 Del. C. §§ 854, 854A, 903A, 914, 915, 915A

Comment:

Generally. This provision criminalizes identity fraud and other improper uses of consumer identification information. Although the offense does not describe "theft" as it is defined in Chapter 2100, the title "identity theft" is popularly understood to convey this offense conduct.

Relation to current Delaware law. Section 2209 corresponds to current 11 Del. C. §§ 854 (the general identity theft provision), 854A (the regulatory scheme concerning the identity theft passport), 903A (the unlawful use of scanning devices), 914 (the unlawful use of consumer identification information), 915 (the unlawful use of credit card information), and 915A (the unlawful use of credit and debit card transaction receipts).

Section 2209(a)(1) corresponds to current § 854(a) and (b), with several changes detailed in the following paragraphs. Section 2209(a)(2) and (a)(3) correspond to current §§ 903A(a) and 903A(b), respectively. Section 2209(a)(4) corresponds to the conduct elements of current §§ 914, 915, and 915A, which have been consolidated. The exception provisions in Sections 2209(a)(4)(A) and (B) directly correspond to current §§ 914(b)(1) and (2), respectively.

Although Section 2209 generally corresponds to the current identity theft and improper uses of consumer identification information offenses, there are several substantive changes between the current code and the Proposed Code. First, Section 2209 adopts a singular culpability requirement of intent to defraud, which improves consistency with other offenses in

Chapter 2200. Current Delaware provisions contain different culpability requirements. For instance, 11 Del. C. § 854 (identity theft) requires that the person "knowingly or recklessly" obtain or produce personal identifying information with the intent to use such information to commit or facilitate any crimes, while conviction under the unlawful use of reencoder and scanning devices requires the defendant to "knowingly, willfully, and with the intent to defraud" possess or use a scanning device. To consolidate the offenses, and allow for consistency and clarity, the singular culpability requirement of "intent to defraud" has been adopted.

Second, the requirement that the actor know that the illegally-obtained personal identifying information will be used by a third party to commit or facilitate any crime contained in 11 Del. C. § 854(b) has not been included in Section 2209. The knowledge requirement in the current provision is redundant with the "intent to defraud" culpability in Section 2209(a). If the defendant intends to defraud the victim by transferring that person's personal information, then the defendant knows how that information is likely to be used. Under the Proposed Code, identity theft will only require that the actor: (1) illegally obtain or transfer personal identifying information, (2) without the consent of the owner.

11 Del. C. § 854A, the regulatory scheme concerning identity theft passports, has not been included in this Section. That provision does not contain any criminal offenses, but rather describes the procedure through which a victim of identity theft obtains an identity theft passport through the Office of the Attorney General. It should be relocated to a more appropriate part of the Delaware Code.

Section 2209(b) sets two different grading levels: offenses under Subsections (a)(1), (a)(2), or (a)(3) as a Class 7 felony; and the offense under Subsection (a)(4) as a Class D misdemeanor. Subsection (b)(1) (Class 7 felonies) is roughly one grade higher than that provided in its source statutes: 11 Del. C. § 854(d) (identity theft); 11 Del. C. § 903A(a) (possession or use of a scanning device); and 11 Del. C. § 903A(b) (possession or use of a reencoder). The legislation authorizing this Proposed Code mandates that "disproportionate" statutes be identified and rectified. The proportionality of an offense's authorized punishment is directly tied to the grade assigned to that offense. An offense's grade could be either disproportionately high or low. The nonpartisan consultative group supervising the drafting process for this Proposed Code has scrutinized the relative grading of all offenses, and has decided that this offense's grade is disproportionately high when compared to other offenses of the same grade in current law. The grade of this offense has been changed to reflect that judgment. Subsection (b)(2) (Class D misdemeanors) corresponds to offenses under current Delaware law that are graded as unclassified misdemeanors: 11 Del. C. § 914(c), 11 Del. C. § 915(d), and 11 Del. C. § 915A(c). Because the Proposed Code does not grade offenses as "unclassified misdemeanors," grading has been set to a Class D misdemeanor (30 days imprisonment) to maintain internal consistency.

Comment on Section 2210. Commercial Bribery

Corresponding Current Provision(s): 11 Del. C. §§ 881, 882; 31 Del. C. § 1005

Comment:

Generally. This provision criminalizes the offer of a bribe to influence or receipt of a bribe to be influenced in matters relating to one's duty of fidelity in a statutorily enumerated position or relationship. Section 2210 is distinct from the bribery provisions in Section 3101

because those offenses cover the use of property or personal advantage to influence a public servant in the performance of the public servant's duties, while this Section relates to persons in positions of trust other than public officials. Section 2210 defines a *commercial* bribery offense, while Section 3101 deals with bribery in the context of public administration.

Relation to current Delaware law. Section 2210 corresponds to 11 Del. C. §§ 881 and 882 and 31 Del. C. § 1005. Section 2210 is broad enough to cover the offer or receipt of bribes in medical kickback schemes, which are currently covered under 31 Del. C. § 1005. That provision criminalizes the solicitation or receipt of any remuneration for various benefits, including referrals, preferable purchases using public assistance funds, and patient admittances.

Section 2210(a)(1) creates a broadly applicable intent requirement to both offering and receiving a bribe. Subsection (a) corresponds to 11 Del. C. § 881. Current § 881 distinguishes between various intent requirements based on the individual that the defendant is bribing. For instance, when bribing a sports official, the defendant must act "with intent to influence the official to perform duties improperly," while bribing a participant in a sports contest requires the defendant to act "with intent to influence that . . . participant not to give [the participant's] best effort." Subsection (a)(1) replaces these idiosyncratic intent requirements with a general "intent to influence another . . . or be influenced by another in any respect to any of the person's acts, decisions, or duties." This intent requirement is broad enough to encompass the individual intent requirements in § 881, but narrow enough as to not substantively change the meaning of those intent requirements.

Subsection (a)(2) prohibits offering, conferring, or agreeing to confer any benefit on another with the intent to influence that person's acts, decisions, or duties; and soliciting, accepting, or agreeing to accept any benefit on another with the intent to be influenced by another in any respect to one's acts, decisions, or duties. Subsections (a)(2)(A) through (E) correspond to 11 Del. C. §§ 881 and 882, except that the categories of individuals who can bribe or be bribed have been expanded. The proposed provision maintains certain categories of individuals, such as employees, agents, fiduciaries, and sports participants and officials, but also adds new categories of individuals such as lawyers, physicians, officers, directors, and the like who hold positions of public trust and duties of fidelity and who may be susceptible to commercial bribery.

Section 2210(b) grades the commercial bribery offenses as a Class A misdemeanor. Subsection (b) corresponds to the grading levels of 11 Del. C. §§ 881 and 882. 31 Del. C. § 1007(c) grades kickback schemes in current § 1005 as a Class E felony; but, Subsection (b) unifies the grading levels for the offenses in Section 2210 as Class A misdemeanors. Setting the grading level of medical kickbacks as a Class E felony is disproportionately high, because the more serious offense of bribing witnesses, jurors, and government officials in Section 3101 is graded as a Class 7 felony.

Comment on Section 2211. Fraudulent Conveyance or Receipt of Public Lands

Corresponding Current Provision(s): 11 Del. C. §§ 911, 912

Comment:

Generally. This provision criminalizes the fraudulent conveyance or receipt of public lands.

Relation to current Delaware law. Section 2211 corresponds to 11 Del. C. §§ 911 and 912. Current §§ 911 and 912 prohibit executing or receiving any deed or other written instrument purporting to convey an interest in land any part of which is public land in Delaware when the defendant does not have any legal or equitable interest in the land.

Section 2211(a) introduces an "intent to defraud" culpability requirement. The requirement is newly introduced as current §§ 911 and 912 have no explicit culpability requirement. Section 2211 also separates the offense into its constituent elements for easier reading and application.

Section 2211(b) corresponds to the grading provisions of §§ 911 and 912, which grade the offense as a Class G felony, but sets the grading level as a Class 8 felony because Class 8 is the lowest felony grade in the Proposed Code.

Comment on Section 2212. Unauthorized Impersonation

Corresponding Current Provision(s): 11 Del. C. §§ 907, 907A, 18 Del. C. § 4354

Comment:

Generally. This provision criminalizes the unauthorized impersonation of another person in order to injure or defraud another person. Although impersonation, like other conduct prohibited in Chapter 2200, is often used to achieve theft, Section 2212 serves two functions that complement Chapter 2100's prohibitions against theft. First, Section 2212(a)(1) can punish injury to impersonated persons, such as injury to reputation, which theft offenses do not address. Second, where one impersonates another to steal property whose value is low or difficult to determine, Section 2212(b)(1) grades the offense as a Class A misdemeanor; where more serious violations can be proven, more severe sanctions are available under Chapter 2100.

Relation to current Delaware law. Section 2212 corresponds, in large part, to 11 Del. C. §§ 907 and 907A. Section 2212(a)(1) corresponds directly to § 907(1) and (2). The intent requirement of Subsection (a)(1), "with intent to obtain a benefit, or to injure or defraud another person," directly corresponds to that of § 907(1) and (2). Note that while 11 Del. C. § 907(3) prohibits impersonating a public servant, such conduct is prohibited by proposed Section 3204(a)(1).

Section 2212(a)(2) prohibits impersonating a bail bond agent and corresponds to 18 Del. C. § 4354(a).

Section 2212(a)(3) corresponds to 11 Del. C. § 907A. Subsections (a)(3)(A) and (B) combine the conduct requirements found in current § 907A, but instead of either "knowingly pretend[ing] to have been someone other than the driver of the vehicle the person was operating" or "knowingly pretend[ing] to have been a driver of one of the vehicles involved in the

accident," Subsection (a)(3) criminalizes falsely representing that the defendant was or was not operating a motor vehicle involved in the accident.

Section 2212(b)(1) corresponds to the grading provisions in 11 Del. C. § 907 and 18 Del. C. § 4354. Current § 907 grades criminal impersonation as a Class A misdemeanor, while current § 4354(a) grades the criminal impersonation of a bail bond agent as a Class F felony. Subsection (b)(1) grades both offenses as a Class A misdemeanor, so as to maintain consistency between these very similar offenses. Subsection (b)(2) corresponds to current § 907A and grades the offense as a Class 8 felony, the lowest possible felony grade in the Proposed Code.

Comment on Section 2213. Definitions

Corresponding Current Provision(s): 11 Del. C. §§ 222(6)&(13), 854, 901, 903A, 904, 906, 926

Comment:

Generally. This Section provides definitions of key terms used in this Chapter.

Relation to current Delaware law.

Section 2213(a) provides a definition for "adulterated," which corresponds to the existing definition found in 11 Del. C. § 906(4).

Section 2213(b) provides a definition for "counterfeit mark," which corresponds to the existing definition found in 11 Del. C. § 926(b)(1).

Section 2213(c) provides a newly-introduced definition for "defraud." "Defraud" is defined to uniformly mean "to obtain anything of value through deception." Currently, "defraud" and "fraud" are separately defined in 11 Del. C. §§ 222(6) and (13), respectively. Simplifying the definition to that of Section 2201(c)(1) eliminates the need to refer to two different definitions to give content to a single, key concept and defines fraud by relying upon a better understood concept that is already used widely—deception.

Section 2213(d) provides a definition for "issu[ing]" a check, which corresponds to the existing definition found in 11 Del. C. § 901(a).

Section 2213(e) provides a definition for "mislabeled," which corresponds to the existing definition found in 11 Del. C. § 906(4).

Section 2213(f) provides a definition for "pass[ing]" a check, which corresponds to the existing definition found in 11 Del. C. § 901(b).

Section 2213(g) provides a definition for "payment card," which corresponds to the existing definition found in 11 Del. C. § 904.

Section 2213(h) provides a definition for "personal identifying information," which corresponds to the existing definition found in 11 Del. C. § 854(c)

Section 2213(i) provides a new definition for "put forward" and is intended to encompass a variety of actions, ultimately done with the aim of giving currency to an item.

Section 2213(j) provides a definition for "reencoder," which corresponds to the existing definition found in 11 Del. C. § 903A(e)(1).

Section 2213(k) provides a definition for "scanning device," which corresponds to the existing definition found in 11 Del. C. § 903A(e)(2).

CHAPTER 2300. ARSON AND OTHER PROPERTY DAMAGE OFFENSES

Section 2301. Arson
Section 2302. Endangering by Fire or Explosion
Section 2303. Unlawful Incendiary Devices
Section 2304. Criminal Damage
Section 2305. Causing or Risking Catastrophe; Ecological Catastrophe
Section 2306. Definitions

Comment on Section 2301. Arson

Corresponding Current Provision(s): 11 Del. C. §§ 801, 802, 803

Comment:

Generally. This provision defines the offense of arson, a crime that combines the harms of two separate offenses: damaging property and endangering life. Like the current Delaware arson offenses, Section 2301 is restricted to situations where damage results to buildings, and not other kinds of property, due to the heightened risk of injury to persons present within those buildings. Other kinds of property damage are covered by the criminal damage offense in Section 2304.

Relation to current Delaware law. Delaware currently has three degrees of arson spread across three provisions. Section 2301 combines these into a single offense, but preserves the distinctions present in current law by varying grading based upon the culpability of the defendant. Section 2301(a) combines the common elements of the offense definitions of §§ 801–03. The variations in required culpability are moved into the grading provisions of Subsection (b).

Section 2302(b)(1) preserves the grades for damaging a building with a culpability higher than recklessness from 11 Del. C. §§ 802(a) and 803. Subsection (b)(1)(B), however, reinterprets the culpability as to another's presence in § 803(1)–(2) as recklessness. Those provisions impose liability for first-degree arson on a defendant who either knew another person was present in the damaged building, or knew of circumstances rendering such presence a "reasonable possibility." The definition of reckless action in the current § 231 applies when "the person is aware of and consciously disregards a substantial and unjustifiable risk that the element exists or will result from the conduct." The requirements in § 231 and § 803(2) are two ways of expressing the same idea. On the other hand, 11 Del. C. § 803 treats separately the defendant's knowledge or recklessness as to a person's presence in the building, despite applying the same grade to both. Therefore, Subsection (b)(1)(A) has been added to account for the materially more blameworthy case where a defendant knows a person is inside the building, making arson akin to attempted murder. Subsection (b)(2), additionally, preserves the grading from § 801 for a defendant who is merely reckless as to the resulting damage to a building. For an additional matter concerning culpability in Section 2301, see the footnote to Section 2301(b)(1).

Section 2301(c) preserves the defense in §§ 801(b) and 802(b)(1) for defendants who choose to damage buildings that solely belong to them. Presumably, in these situations, the defendant would have first-hand knowledge as to whether persons are present in the building, making it much less likely that human life would be endangered. But, an ownership defense

cannot extend to situations where the defendant is reckless as to other persons' presence, which Subsection (c) specifies. Note that the owner-defendant could still commit a reckless endangerment offense under proposed Section 1203 if the burning creates a risk of injury to persons not present in the defendant's building. Additionally, Subsection (c) does not retain the references in current law to acquiring consent from other owners of the building, because there is a general defense based on consent in proposed Section 208.

Lawful Purpose. Section 2301 has not retained the defense in § 802(b)(2) for a defendant whose "sole intent was to destroy or damage the building for a lawful purpose," because in such situations, the defendant would be covered by a justification defense, a consent defense, or under proposed Section 209 because the harm caused was not the one contemplated by the General Assembly when creating an arson offense.

Reasonable Belief as Defense. Section 2301 has not retained the defense in § 802(b)(3) for a defendant who "has no reasonable ground to believe that the conduct might endanger the life or safety of another person or damage another building." There are a few reasons for its omission. First, the defense only applies to second-degree arson. If such a defense should exist at all, it should apply to all forms of arson, because the reason the offense exists separately from criminal damage is to punish endangerment of human life. Second, the defense assumes an offense element—negligence as to endangerment of life or property—that does not appear in any degree of arson, and is inconsistent with the culpability levels required as to resulting damage. Because Section 1203 covers endangerment of life, and Sections 2302 and 2304 cover endangerment of property, there is no reason to complicate the arson offense by including conflicting endangerment requirements, or defenses to them.

Comment on Section 2302. Endangering by Fire or Explosion

Corresponding Current Provision(s): 11 Del. C. § 804

Comment:

Generally. This offense generally covers conduct that creates a risk of harm to property by fire or explosion. Unlike arson, this offense does not require that damage to another's property result from an offender's dangerous activity, and has a lower culpability requirement. Additionally, Section 2302 does not contemplate risk of injury to persons, which is left for the reckless endangerment offense in proposed Section 1203. For those reasons, this offense is graded less harshly than arson.

Relation to current Delaware law. Section 2302 is substantially the same as the current § 804 (reckless burning or exploding), but with three differences. First, the offense definition has been broken into its elements for easier reading and application. Second, and more significantly, Section 2302(a) removes endangerment of human life as a basis for liability. Such risks are already handled with more subtlety and precision in Section 1203's reckless endangerment offense. Unless the defendant's activity also damages property, § 804 is only a Class A misdemeanor, no matter how egregious a risk to human life the defendant creates. The means by which life is endangered should not affect the grade of the offense. Third, the offense grade has been disconnected from resulting harm. If harm did result from conduct prohibited by § 804, the offense would be redundant with both the current criminal mischief offense and proposed

Section 2304. Instead, the offense has been given the grade the current offense would have if no damage resulted.

Comment on Section 2303. Unlawful Incendiary Devices

Corresponding Current Provision(s): 11 Del. C. § 1338

Comment:

Generally. Ordinarily, possession offenses will be covered by the proposed inchoate offense for possessing instruments of crime. *See* proposed Section 708. This provision, however, covers the unusually serious situation where possession of the object in question may itself pose an inherent danger.

Relation to current Delaware law. Section 2303 directly corresponds to the current § 1338 (bombs, incendiary devices, Molotov cocktails, and explosive devices), and is graded the same. Yet, several portions of § 1338 have not been retained.

First, only the "possession" and "manufacture" elements of the offense definition in § 1338(a) have been retained. "Transfer", "use", and "transportation" of incendiary devices would already be covered by arson, endangering by fire or explosion, assault, or attempt liability for any of those offenses. Furthermore, the grading would be similar to § 1338.

Second, § 1338(c), requiring that all defendants over age 16 be prosecuted as adults, has not been retained. Issues of adult prosecution are addressed outside of the Proposed Code, in Title 10.

Third, § 1338(d) is not retained because it is an unconstitutional shift of the prosecution's burden of proof to a defendant. 11 Del. C. § 1338(d) provides that "it is prima facie evidence of intent to cause bodily harm or damage to any property or thing if the accused had possession of the [bomb or incendiary device] prescribed by this section." The current law thus allows the prosecution to shift its burden of proof as to the culpability of the defendant in the commission of a crime to the defendant. In *Patterson v. New York*, 432 U.S. 197, 217 (1977), the United States Supreme Court forbade any such burden-shifting and held that "a State must prove every ingredient of an offense beyond a reasonable doubt, and . . . it may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense." Delaware's attempt to assume that an intent to cause bodily harm or damage to any property or thing when the possession element of the offense is satisfied impermissibly shifts the burden of proof of an element of the offense—culpability—to the defendant. The prosecution "must prove every ingredient of an offense." 432 U.S. at 217.

Regulation of Explosives. 16 Del. C. § 7101, et seq. comprehensively regulates licensure, trade, transportation, and use of explosives in Delaware. Some of the penalties of violating the prohibitions in Title 16 are redundant with Section 2303 and other offenses in the Proposed Code. The following provisions should be removed from Title 16:

- 16 Del. C. § 7113(2)–(4). These provisions punish sale, purchase, possession, receipt, or use of regulated explosives "with the knowledge or intent that any explosive material involved was to be used to kill, injure or intimidate any person or unlawfully to damage any real or personal property." The maximum sentence for this offense increases in Subsection (3) if physical injury results, and increases further in Subsection (4) if death results. For situations where explosive materials were used by the defendant to kill,

injure, intimidate, or damage, the defendant's conduct is already accounted for in the Proposed Code by homicide (Sections 1101–04), assault (Section 1202), reckless injuring or endangerment (Section 1203), coercion (Section 1404), arson (Section 2301), or criminal damage (Section 2304). Where the explosive materials are possessed with intent to injure or damage, the conduct is covered by this Section, 2303. Where a supplier of explosives intends that the materials be used to commit an offense, accomplice liability under Section 212 will make the supplier liable for the intended offense.

- 16 Del. C. § 7109(c). This provision punishes making a false entry in records that the same Section requires be kept by persons dealing in licensed explosives. Yet, this conduct is entirely covered by the offense for tampering with public records in Section 3203, and is graded the same.

Additionally, the offenses in 16 Del. C. § 7103, under certain circumstances, could be prosecuted as reckless endangerment under proposed Section 1203. Because the regulatory offenses are not entirely covered by Section 1203, it is recommended that the regulatory offenses remain as they are. Yet, under proposed Section 211, it would be inappropriate for a person to be convicted of both reckless endangerment and an offense under 11 Del. C. § 7103 based on the same conduct.

Comment on Section 2304. Criminal Damage

Corresponding Current Provision(s): 11 Del. C. §§ 805, 811, 812, 849, 931, 936, 939; *see also* 804(b), 941; 3 Del. C. §§ 1041, 1045; 7 Del. C. § 706; 21 Del. C. §§ 4201, 6701, 6703, 6707

Comment:

Generally. This provision defines and grades the offense of criminal property damage. The offense is graded differently depending on the amount of pecuniary loss caused by the offense, as well as the culpability with which the damage is caused or risked. The offense has been renamed from "Criminal Mischief" because "Criminal Damage" more concretely describes the kinds of activities prohibited by the offense.

Relation to current Delaware law. Current Title 11—as well as a number of other administrative Titles—contains various provisions that define different types of property damage, and each provision has its own grading section. The nature of the act underlying these offenses is the same. To the extent the current offense grades of these offenses are the same, they are superfluous; to the extent they differ, they are inconsistent. Therefore, the proposed Chapter 2300 employs a single criminal damage offense.

Section 2304(a) defines the offense almost identically to the definition of the current criminal mischief offense in 11 Del. C. § 811(a). The few changes, however, are important. First, Subsection (a)(2) removes the reference in § 811(a)(2) to creating a risk of danger to persons. That is because this portion of the offense is redundant with Section 1203(b)(2) (reckless endangerment). Furthermore, § 811 grades endangering persons much more leniently, reflecting a discounted seriousness for risks to persons created through interference with property. Such a discount is unjustifiable, and to preserve it would preserve inconsistencies in the Code. Second, by adding the word "unlawfully" in Subsection (a)(3), the affirmative defense for conduct under a lawful purpose from § 811(a)(3) is preserved in a simpler form.

Section 2304(b) grades the offense according to the pecuniary loss caused, and the culpability of the defendant. The proposed scheme follows two principles present in 11 Del. C. §§ 804(b) (reckless burning or exploding), 811(b), and 812(a)(2) (graffiti), but articulates those principles differently. The first principle is the grading distinction between different culpability levels as to causing damage. The distinction between reckless and intentional damaging in § 811(b)(1)–(2) is sensible; but, the distinction is not made consistently. Additionally, its failure to address "knowing" culpability as to damage creates ambiguity. "Knowingly" damaging property is much more similar to intentional than reckless damaging, but under current 11 Del. C. § 253, "knowing" culpability would be punished the same as reckless damaging. For these reasons, Subsection (b)(2) sets "knowingly" as the highest culpability necessary to commit an offense under Section 2304 by providing an upward grade adjustment. Subsection (b)(1) sets the default culpability as recklessness only because the general approach to grading the Proposed Code is to define offenses according to their most basic conduct and provide for grade increases as necessary. It would give a false impression that a reckless offense is not serious if Subsection (b) was defined primarily in terms of knowing causation, and reckless causation was framed as a "grade discount."

The second principle is to grade the offense differently according to the pecuniary loss caused by the defendant. 11 Del. C. §§ 804, 811, and 812 all do this, but the value thresholds for grades are inconsistent. Therefore, Subsection (b) unifies the grade thresholds for all property damage, and does so by following the same thresholds as the theft grading scheme in Section 2101(b). Under current law, in most cases, a defendant prosecuted for criminal mischief would be eligible for a much lower maximum penalty for destroying another person's property rather than stealing it. The harm of both offenses, however, is similar: the victim loses value or use of her property. Therefore, the same thresholds are used both here and in Section 2101(b). Note, however, that the grade adjustment for knowing causation in Subsection (b)(2) must be taken into account in order for the grade thresholds for criminal damage to result in the same offense grade as theft in Section 2101(b). For additional discussion of those thresholds, see the Commentary to Section 2101. Note also that like Subsections 2101(b)(7)-(8), Subsections (b)(1)(G)-(H) contain a special mechanism establishing an even lower grade – that of a violation – for a first offense. Grading these criminal damage offenses as violations, rather than misdemeanors, represents a substantial departure from current law. Violaitons are not crimes, and no imprisonement term may be authorized for violations. This is not simply a general preference which may be included in sentencing guidelines, but rather an absolute bar to imprisonment in all cases to which the violation grade applies. Thus, the discretion of sentencing judges in these cases is limited to the amount of fine to be imposed. In addition, by authorizing only monetary penalties for even intentional criminal damage – a truly blameworthy conduct – the proposed mechanism arguably blurs the line between civil and criminal responsibility. Besides, grading these offenses as violations imposes additional limitations. For instance, under 11 Del. C. § 1904, law enforcement officers are not authorized to arrest offenders commiting violations (a limitation that will apply to criminal damage under Subsection (b)(1)(H)). *See* Commentary to Section 802(a)(13) and 2101(b)(7)-(8). Nevertheless, Subsections (b)(1)(G)-(H) may give a first time offender committing a minor offense a chance for a cleaner path forward, along with an incentive not to re-offend. If the offender has been convicted of a prior offense of a similar nature (including not only offenses under Section 2304, but any property or other pertinent offenses, including offenses under Chapter 2100 [Theft and Related Offenses], or under

Section 4502 [Cheating at Games and Contests]), the rationale for grading the offense as a violation would not apply, and it would be appropriately graded as a misdemeanor.

Reasonable Belief in Right. The current criminal mischief offense, in 11 Del. C. § 811(c), contains a defense for a defendant who "has reasonable ground to believe" that she has "a right to engage in the conduct." This defense has not been included in Section 2304 for two reasons. First, to the extent that the defense does not apply to other, similar criminal damage provisions, the defense is inconsistent. Second, mistakes negating culpability will be treated generally in Section 206, and need not be specifically reiterated here.

Additional Provisions Not Incorporated. Section 2304 does not include the minimum fines or community service provisions in 11 Del. C. §§ 811(b)(4) and 812(a)(2). All minimum sentencing provisions in the Proposed Code are set forth in Section 802. 11 Del. C. § 812(b), dealing with possession of graffiti instruments, is not addressed here. It has been incorporated into Section 708, a new inchoate offense punishing possession of instruments of crime.

Destruction of Rental Property. 11 Del. C. § 849(a) punishes as theft any destruction of rented property that is done to avoid payment for the lease or rental. It is not necessary to specifically provide for this situation in Section 2304 because Section 2304 is already defined broadly enough to cover that situation. Furthermore, because theft and criminal damage are graded the same, there is no inconsistency with current law.

Damage to Computer Equipment and Other Computer Crime Provisions. The increased grades for damage to computer equipment, found in the current §§ 936 and 939, have not been retained in Chapter 2300. Presumably, the justification for setting a lower threshold in this case is to account for intangible losses, such as lost digital files and information. But, the method of valuing property in proposed Section 805 does take intangible losses into account, which more accurately accomplishes the aims of the current law. Therefore, separate grade thresholds are unnecessary. Additionally, 11 Del. C. § 941, specifying civil remedies for computer crimes, has not been incorporated into the Proposed Code because it is not directly relevant to criminal liability. It should be moved to another title dealing with civil remedies.

Regulatory Offenses Not Incorporated. There are numerous regulatory offenses prohibiting specific forms of property damage. Most of those are graded similarly to the scheme proposed in Section 2304(b), and the language in Section 2304(a) covers the activities they prohibit. Therefore, any such offenses scattered throughout the Delaware Code could be eliminated. *See, e.g.*, 3 Del. C. §§ 1041, 1045; 7 Del. C. § 706; 21 Del. C. §§ 6701, 6703, 6707.

Failure to Report Accidental Damage. 21 Del. C. § 4201 makes it an offense to fail to report property damage caused by the defendant's driving. It is punishable as a Class B misdemeanor. Such an offense could be created in Chapter 2300 to account for this, but it should not. Such an offense is inherently bound up in its regulatory framework, is *malum prohibitum*, and too minor in any case to warrant relocation to the Proposed Code.

Cross or Religious Symbol Burning. 11 Del. C. § 805, concerning the burning of crosses or other religious symbols, has not been included in this Chapter. Instead, cross burnings, if conducted with an intent to intimidate, are punishable under proposed Section 1207 (Terroristic Threats). Flatly banning all instances of the burning of crosses or other religious symbols, without any qualifying language regarding the motivations of the actors, is likely overbroad and, depending on the actor's motives, potentially unconstitutional. For instance, in *Virginia v. Black*, 538 U.S. 343 (2003), the United States Supreme Court overturned a Virginia law that prohibited burning "a cross on the property of another, a highway or other public place . . . with the intent of intimidating any person or group of persons." *Id*. at 348. Although permitting states to prohibit

cross burnings done with the intent to intimidate because of the practice's "long and pernicious history as a signal of impending violence," 538 U.S. at 363, and because the practice was considered a "true threat," 538 U.S. at 359-60, outside the protections of the First Amendment, the Court did not allow the prohibition against cross burnings to reach instances of messages other than intimidation; for example, the Ku Klux Klan had used cross burnings as "messages of shared ideology." 538 U.S. at 354. As such, a provision like current § 805, which does not divine the message at the heart of the act of burning religious symbols, would go against the Court's holding that a "State [may] choose to prohibit only those forms of intimidation that are most likely to inspire fear of bodily harm." 538 U.S. at 363. For a discussion of cross burnings that would satisfy the definition of terroristic threats, see the Commentary to proposed Section 1207.

Comment on Section 2305. Causing or Risking Catastrophe; Ecological Catastrophe

Corresponding Current Provision(s): *See* 7 Del. C. §§ 6071–74, 6309(h)

Comment:

Generally. This provision proposes a new offense that imposes serious criminal liability for persons who cause or risk severe harm to numerous individuals, numerous buildings, or a vital public facility. Additionally, the provision would impose similar but much less severe criminal liability for causing or risking harm to marine environments and other protected ecological zones.

Relation to current Delaware law. Currently, Title 11 contains no offense that is similar to the proposed Section 2305(a)–(d). The Model Penal Code and many other states' criminal codes, however, contain offenses for causing or risking catastrophe. The harm caused or risked under Section 2305 is so severe, is so likely to induce public panic if threatened, and reflects such a heinous disregard for the value of human life as to warrant significant criminal liability that other offenses may not impose simply by conviction of multiple counts. When the current Delaware criminal code was enacted in 1972, catastrophes of the sort contemplated by Section 2305(a)–(d) may have seemed so unlikely to occur as to not require separate treatment. But, in the era of modern terrorism, we know that catastrophic loss of life and damage to buildings and domestic infrastructure are possible events that the criminal law ought to take into account. Therefore, Section 2305(a)–(d) proposes a related collection of related offenses based on causing, risking, threatening, or conspicuously failing to prevent a catastrophe.

Section 2305(a) imposes the most serious liability where a catastrophe has actually been caused. Subsection (a)(1) provides a non-exclusive list of possible means by which catastrophe may be caused. Liability under Subsection (a)(2) depends upon whether the actor caused the catastrophe knowingly or recklessly. Both situations are graded very seriously. Considering the definition of a "catastrophe" in Subsection (f)(1), however, the available sentences are proportionate to the harm caused.

Section 2305(b) provides lesser punishment for recklessly risking a catastrophe, but where no catastrophe actually results. Liability under Subsection (b)(2) is less severe than under Subsection (a)(2), but is more severe than other forms of reckless endangerment under Section 1203(b) because of the magnitude of the harm risked.

Section 2305(c) punishes threatening to cause a catastrophe, independent of whether catastrophe is actually caused. Subsection (c) is different from Section 1204(a)(1) (terroristic

threats) only in the magnitude of the harm threatened. For that reason, it is graded one level more harshly than terroristic threats.

Section 2305(d) punishes reckless failure to prevent a catastrophe where the person is uniquely situated to do so, either by virtue of official or contractual position, or relationship to the actor creating the catastrophe. Criminal law generally hesitates to punish inaction. But, because of the severity of the harm posed by a catastrophe, it is morally blameworthy for a person in a position to prevent a catastrophe to recklessly disregard a substantial risk that it could occur, thereby allowing it to occur.

Section 2305(e) provides lesser, but similarly graduated, liability for actors who cause, risk, threaten, or fail to prevent ecological catastrophes. Subsection (e) corresponds to, but expands upon, the current offenses for ocean dumping found in 7 Del. C. §§ 6071–74, and for improper disposal of hazardous waste in 7 Del. C. § 6309(h). Normally, environmental offenses would be left in their respective regulatory Titles. But, both §§ 6074 and 6309(h) punish improper disposal with substantial fines and felony levels of imprisonment. Such serious penalties ought to be incorporated into the Code. Subsection (e) broadens those offenses by imposing liability for damaging marine environments by any inherently dangerous means, and not simply by dumping solid waste. Note, however, that unlike proposed Section 2305(e), § 6074 imposes criminal liability for ordinary negligence. Even criminal negligence is too slight a culpability requirement to support liability for this kind of behavior, especially given the sizable fines available under Subsection (e)(2). Therefore, like the rest of Section 2305, reckless activity is the least culpable behavior punished by Subsection (e). Subsection (e) graduates liability by reference to Subsections (a)–(d), allowing punishment for causing, risking, threatening, or failing to prevent ecological catastrophes. This is an expansion upon current liability for ecological disasters, particularly concerning threats or failure of prevention, which has been done for consistency. The lesser seriousness of an ecological catastrophe is taken into account by lowering the grade of these offenses 3 or 4 levels. Subsection 2305(e)(2) specifies that a maximum fine of twice that provided for the grade of an offense under Section 803(a) will be levied for each day that activity causing or risking ecological catastrophe continues. This provision is incorporated from 7 Del. C. § 6074(b), except that current fine parameters of "not less than $5,000 nor more than $50,000 per day of violation," 6 Del. C. § 6074(b), has been changed to the proposed "twice that provided for the grade of an offense under Section 803(a)." Yet, it is not necessary for all the activities in Subsections (a)–(d) to also be punished for ecological catastrophes.

Section 2305(f) clarifies that the proposed Section 210 may prohibit convictions under Section 2305 and another offense based upon the same conduct. This provision, however, does not prohibit charging under both Section 2305 and another offense. The definitions of "catastrophe," "catastrophic agent," and "ecological catastrophe" contained in Section 2306 precisely set forth the type of harms caused or risked that deserve the increased punishment of this Section.

<u>Comment on Section 2306. Definitions</u>

Corresponding Current Provision(s): 11 Del. C. §§ 811, 934, 1338; 7 Del. C. § 6071

Comment:

Generally. This Section provides definitions of key terms used in this Chapter.

Relation to current Delaware law. Sections 2306(a), (b), and (d) provide definitions of "catastrophe," "catastrophic agent," and "ecological catastrophe," respectively. "Catastrophe" has been defined to require serious harm to five or more victims or buildings to distinguish the severity of offenses in Section 2305 from assault in proposed Section 1202. Because Title 11 contains no offense that is similar to Sections 2305(a)-(d), the definitions are newly created, although the definition of "ecological catastrophe" corresponds to the purposes of the ocean dumping offense found in 7 Del. C. § 6071. See 7 Del. C. § 6071 ("Therefore, it is the intent of the General Assembly [of Delaware] to prohibit the disposal of solid wastes in the ocean and other waters of the State."). Yet, the definition allows the General Assembly to specify other ecological zones for protection under Section 2305(e) besides marine environments.

Section 2306(c) provides a definition of "damage." The term is newly defined to ensure that digital property damage and impairment of computer services, as criminalized by 11 Del. C. § 934, are covered by Section 2304. Additionally, the enumerated services in 11 Del. C. § 811(a)(3) are placed here to make the offense definition in Section 2304 cleaner.

Section 2306(e) provides a definition of "incendiary device" that corresponds to the definition currently found in 11 Del. C. § 1338(a)(1). The definition has been simplified to its essential parts to make the Section 2303(a) offense definition easier to understand.

Section 2306(f) provides a definition of "public service" that corresponds to the language listing various utilities contained in 11 Del. C. § 811(a)(3) and (b)(1).

CHAPTER 2400. BURGLARY AND OTHER CRIMINAL TRESPASS OFFENSES

Section 2401. Burglary and Home Invasion
Section 2402. Criminal Trespass
Section 2403. Definitions

Comment on Section 2401. Burglary and Home Invasion

Corresponding Current Provision(s): 11 Del. C. §§ 824, 825, 826, 826A, 827, 829

Comment:

Generally. This provision defines the offenses of burglary and home invasion, which punish trespassers who possess an additional criminal intent. Home invasion imposes harsher punishment where the additional intent is to commit a violent offense, and an attempt is made to satisfy that intention. These distinct offenses recognize the independent harm caused by the fear and intrusion that may be created by an intruder who invades another's property to commit an offense.

Relation to current Delaware law. Section 2401(a) corresponds to the offense definitions for the current three degrees of burglary, plus home invasion. Instead of defining each as a separate offense, the common elements to all four offenses are distilled, and the differences are reserved to determine the grade of the offense. Structurally, the elements have been broken into different subsections for easier reading and application.

As previously mentioned, Section 2401(b) maintains the distinctions between the current offenses through grading. But, the structure of those offenses has been changed. Subsection (b)(1) retains the heading of "home invasion" for its familiarity. In reality, home invasion has been broadened to include more behavior, but at varying grades. The current home invasion statute corresponds to Subsection (b)(1), plus the grade adjustment in Subsection (b)(4). Behavior short of the grade adjustment is still punishable at a higher grade than burglary, which is not the case under current Delaware law. Subsection (b)(2) corresponds to the current § 825(a)(1) (second degree burglary) when combined with the grade adjustment in Subsection (b)(4). Committing aggravated burglary at night has been turned into an independent factor increasing the grade of the offense, which creates more grading options than under current law. Currently, first degree burglary in 11 Del. C. § 826(a) requires three aggravating factors to be present, in addition to the basic requirements of burglary: the offense must be committed in a dwelling, it must be committed at night, and the defendant must be armed or cause physical injury to someone. Adding the grade adjustment in Subsection (b)(4) to Subsection (b)(2)(A) produces the same effect as § 826(a). Subsection (b)(3) corresponds to 11 Del. C. § 824 (third degree burglary). Adding the grade adjustment to it produces the same effect as § 825(a)(2) (second degree burglary).

Note that Subsections (b)(4)(A) and (b)(4)(B) require proof of the same elements as weapons possession and assault, respectively. Both 11 Del. C. § 206 and proposed Section 210 would not allow a defendant to be convicted of burglary with the aggravations in Subsection (b)(4) *and* either weapon possession or assault, though the defendant could be charged with both. Note also that the language in Subsection (b)(4)(A) is broad enough to include defendants who

do not bring weapons with them, but arm themselves with weapons found while committing or fleeing from a burglary or home invasion.

Section 2401(c) directly corresponds to the current § 827.

Formation of Intent. Note that the 11 Del. C. § 829(e) has not been retained. That provision changed the classic burglary intent formulation—that the intent to commit the offense be formed prior to or concurrent with entry—to allow the intent to be formed after entry.[12] Under the classic intent formulation, later-formed intent could still produce liability for the attempt or additional offense, and the entry itself would be punishable as criminal trespass. In reality, "burglary" need not be an offense at all; it exists because society recognizes that a criminal trespass motivated by the intention to commit an offense is more dangerous, and more deserving of punishment, than criminal trespass. The trespass is not motivated by the intent, however, if the intent is formed after the trespass is already complete. 11 Del. C. § 829(e) destroyed the essential nature of burglary as a separate offense from criminal trespass. For these reasons, § 829(e) is not retained.

Yet, no provision has been added to explicitly restate the ordinary burglary intent formulation. It is expected that that formulation will be revived by the removal of § 829(e), considering how firmly entrenched is the formulation in the history of criminal law.

Comment on Section 2402. Criminal Trespass

Corresponding Current Provision(s): 11 Del. C. §§ 820, 821, 822, 823; *see also* 7 Del. C. § 718

Comment:

Generally. This provision defines and grades the offense of criminal trespass, which prohibits a person's unlawful presence on another's property.

Relation to current Delaware law. Section 2402(a) corresponds to the offense definitions for the three current degrees of criminal trespass, as well as trespassing with intent to peer or peep into a window. As with Section 2401, the common elements to those offenses have been distilled and divided according to those elements, and the differences have been retained in the grading provisions. The offense definition has been worded and structured to make it obvious that criminal trespass is a lesser-included offense to burglary.

Section 2402(b) maintains the grading distinctions between the various combined offenses. Note that current § 820 (trespass with intent to peep), though it requires a trespass, is an aggravation based upon an invasion of privacy. For that reason, it could be categorized with other privacy offenses. For more invasion of privacy offenses, see Chapter 4300.

Hunters' Trespass. Note the existence of 7 Del. C. § 718. It is a trespassing offense committed by hunters who fail to obtain permission to hunt on private property. It has not been specifically incorporated into Section 2402 for two reasons. First, it is redundant with Section 2402. Second, it is graded as a class C environmental violation, which is roughly equivalent to a

[12] Subsection (e) was added to 11 Del. C. § 829 in response to *Dolan v. State*, 925 A.2d 495 (Del. 2007), where the Delaware Supreme Court ruled that a defendant could not, as a matter of law, be found guilty of burglary if he formed the intent to commit an offense only after trespassing. Note that the defendant in *Dolan* was also found guilty of theft, the offense committed during the trespass.

criminal violation—the same as Subsection (b)(4). As Section 2402 covers the same ground, § 718 could be omitted from Title 7.

Trespass Among Livestock. Under 11 Del. C. § 823, first-degree trespass, a trespass in a "building used to shelter, house, milk, raise, feed, breed, study or exhibit animals" is treated equally with trespass in a *dwelling*. Despite the importance of Delaware's livestock, those situations simply are not equally blameworthy for the purpose of criminal liability. When § 823 was amended to include trespass among livestock, it is possible that Delaware faced a serious threat to agriculture due to trespassers. But, no such threat is present today that would justify a separate offense or grade level for trespasses of that kind. Under Section 2402, trespasses among livestock would be punished as a Class D misdemeanor, because animal pens or housing would be "fenced or enclosed in a manner manifestly designed to exclude intruders."

Comment on Section 2403. Definitions

Corresponding Current Provision(s): 11 Del. C. § 829

Comment:

Generally. This Section provides definitions of key terms used in this Chapter.

Relation to current Delaware law. Sections 2403(a) and (b) provide definitions of "dwelling" and "entry" that correspond to current 11 Del. C. §§ 829(b) and (c). The remaining definitions in § 829 are unnecessary, in part due to the fact that some terms' meanings are readily apparent or has not been retained (e.g., § 829(e)), and in part due to the fact that § 828 (possession of burglar's tools) has been incorporated into proposed Section 708, a new inchoate offense for possessing instruments of crime. The definition of "dwelling" has been reworded to make clear that offenses involving them need not be committed at night, as well as to take into account other non-buildings used as dwellings that are equally entitled to privacy.

Section 2403(c) defines the term "real property" in a common way, to make sure buildings and other structures are included.

OFFENSES AGAINST PUBLIC ADMINISTRATION

CHAPTER 3100. BRIBERY, IMPROPER INFLUENCE, AND OFFICIAL MISCONDUCT

Section 3101. Bribery
Section 3102. Improper Influence
Section 3103. Official Misconduct
Section 3104. Definitions

Comment on Section 3101. Bribery

Corresponding Current Provision(s): 11 Del. C. §§ 1201, 1202, 1203, 1204, 1205, 1206, 1209, 1261, 1262, 1264, 1265; *see also* 1502(3), 1504(b)(1)

Comment:

Generally. This provision creates an offense covering the use of property or personal advantage to influence a public servant in the performance of their duties.

Relation to current Delaware law. Section 3101(a) corresponds with the current bribery provisions found in 11 Del. C. §§ 1201 and 1205. Currently, offering a bribe and receiving a bribe are prohibited by different sections of the Delaware Code. Section 3101(a) promotes clarity by defining the offense of offering a bribe immediately before the offense of receiving a bribe. For the reasons discussed below, the conduct previously punished by § 1205 is now punishable as a Class 7 felony, like the conduct previously punished by § 1201, and not as a Class A misdemeanor. Subsection (a)(2) changes current law by punishing the offender for believing acceptance of the bribe to be an offense. Under Subsection (a)(3), the offense requires that the recipient of a bribe must not be authorized to receive the bribe. So the act of offering the bribe—even if the intended recipient does *not* accept it, or does accept it but is not influenced by it—is still punishable under the law. This formulation focuses on proving the defendant's subjective belief of wrongdoing, rather than the wrongdoing of another person who may or may not be a defendant. The elements of (1) influencing the performance of an act of another and (2) that the personal benefit not be authorized by law, are identical to those in Subsection (b). These elements are intended to have the same meaning, and should be construed identically in practice. Note also that Section 3101(a)(2)(c) includes witnesses in the offense. This simple addition makes the independent offense in 11 Del. C. § 1261 unnecessary. Note that this offense is graded the same as Section 3101.

Section 3101(b) corresponds with the current bribery provisions found in 11 Del. C. §§ 1203 and 1206. The purpose and function of the current provisions are maintained here, but are simplified into a single Subsection. The proposed formulation alters the current provisions in four minor respects.

First, Section 3101(b) combines the offenses covered by §§ 1203 and 1206. Receiving a "bribe" and an "unlawful gratuity" are not so different as to warrant separate provisions and different maximum penalties. Rather, both involve a public servant's acceptance of a benefit meant to influence the public servant in the performance of the public servant's duties. The fact that the public servant is "required or authorized" to perform the official conduct for which the

public servant receives an "illegal gratuity" should not entitle the offender to a lesser grade. Section 3101(b) eliminates the "illegal gratuity" distinction and punishes a public servant who extracts a bribery payment for completing the public servant's required or authorized duties to the same degree as a public servant who accepts a bribery payment meant to influence the public servant's judgment or exercise of discretion. The result is that the conduct previously punished by § 1206 is now punishable as a Class 7 felony, like the conduct previously punished by § 1203, and not as a Class A misdemeanor.

Second, Section 3101(b) requires that the offender act knowingly in soliciting or offering the bribe. The current bribery offenses do not specify a culpability requirement. Section 3101(b) requires only that the person be "knowing" as to the benefit's serving as "consideration for influencing or agreeing to influence" an official's performance. This formulation captures all cases in which the offender understands the improper nature of the transaction, while avoiding the ambiguity that can result from a provision lacking a stated culpability requirement.

Third, Section 3101(b) summarizes the enumerated examples found in § 1203 (e.g., "vote, opinion, judgment, action, decision, or exercise of discretion"). The new language is not meant to effect a substantive change in the law, but rather intends to convey the former language in a simpler form.

Fourth, Section 3101(b) includes witnesses in the offense. This addition makes the independent offense in 11 Del. C. §§ 1262 unnecessary. Note that this offense is graded the same as Section 3101.

Section 3101(c)(2) maintains the grading provisions found in §§ 1201 and 1203, but subject to the changes discussed above. Section 3101(c)(1) preserves the defense found in § 1202 for defendants who offer, confer, or agree to confer a benefit upon a public servant as a result of the public servant's theft, but in the form of a grade adjustment. Subsection (c)(1) is broader than § 1202 as it applies to all cases when the defendants' conduct was in direct response to any wrongdoing (not only theft) by the bribe recipient. Bribing a public servant in response to the public servant's own wrongdoing is less blameworthy, due to the offeror's status as a victim. Yet, the complete defense in current law is redundant with general defenses that apply in all cases. The proposed general defenses for duress in Section 406 and lesser evil in Section 302 are robust enough to provide a complete defense to liability where the public servant's threats and misfeasance are truly coercive, or present an imminent threat to the public or a private party. Short of that, people have recourse to law enforcement authorities when public servants are extracting bribes by the wrongful means, including the means described in § 1202. Additionally, the references to attempts and coercion in § 1202 have been removed for the reasons already mentioned. Furthermore, attempted theft as a motivator for a bribe appears to more closely resemble official misconduct, which is a form of "wrongful conduct" covered by the language of Subsection (c)(1). Finally, the Proposed Code eliminates the language contained in § 1204 stating that the affirmative defense does not apply to the conduct covered by Subsection (b). The fact that Section 3101(c)(1) specifically applies only to Subsection (a) implies that it is not applicable to Subsection (b).

Section 3101(d) establishes an additional consequence of conviction, requiring forfeiture of office for a public servant convicted of an offense under this Section. Current law does not have such a provision for bribery. Yet, current law does provide for forfeiture in 11 Del. C. § 1504(b)(1), which requires a person convicted of racketeering to forfeit any position or office in an enterprise that is "acquired or maintained" in violation of the racketeering statute. Furthermore, 11 Del. C. § 1502(3) defines "enterprise" to include governmental entities.

Subsection (d) has been added for consistency with that principle. Note, upon conviction (as the term defined in Section 509(b) [Definitions]), the office is forfeited immediately. See also Commentary to Section 3103(d) [Official Misconduct].

Bribing a Juror and Bribe Receiving by a Juror. 11 Del. C. §§ 1264–65 have not been specifically included in the Proposed Code because a "public servant" is defined in Section 3104(d) to include jurors. Given that the grade of §§ 1264–65 are graded the same as in Section 3101, those offenses are redundant.

Comment on Section 3102. Improper Influence

Corresponding Current Provision(s): 11 Del. C. §§ 1207, 1208

Comment:

Generally. This provision creates an offense covering the use of coercion to influence a person's decision, opinion, vote, or other exercise of discretion as a public servant, party officer, or voter.

Relation to current Delaware law. Section 3102 is substantially the same as the current § 1207, with two minor differences. First, Section 3102(a) utilizes the phrase "uses coercion with intent to influence another person's decision, opinion, vote, or other exercise of discretion" instead of § 1207's "threatens unlawful harm" language. Threatening unlawful harm is an unduly narrow construction of essentially what the offense of coercion prohibits, and defining the improper influence offense in a broader way improves consistency. Second, Section 3102(a) omits § 1207(2)'s language ("The person threatens unlawful harm to any public servant or party officer with intent to influence that public servant or party officer to violate that public servant's or party officer's duty as a public servant or party officer.") because the conduct prohibited by that subsection is adequately prohibited by the language of § 1207(1), which is incorporated as Section 3102(a).

Note that Section 3102(a) can overlap with Section 3308 when the target of the improper influence is a juror. For example, a defendant might be liable for attempting to influence a juror under both Sections 3102(a) ("A person commits an offense if he or she uses coercion with intent to influence another person's decision, opinion, vote . . . .") or 3308(a) ("A person commits an offense if: (1) with intent to: (A) influence the performance of a juror's duties . . . (2) he or she: (B) deceives, persuades, or commits an offense against the person . . . ."). To the extent that the two offenses overlap regarding jurors, Section 3102 is a lesser included offense of Section 3308, and a defendant could not be convicted of both under Section 210.

Section 3102(b) preserves the 11 Del. C. § 1208, which denies a defense based on a defect in office.

Section 3102(c) increases the grade of the offense from a Class A misdemeanor to a Class 8 felony. The current Delaware coercion offense in 11 Del. C. § 792 is a Class A misdemeanor by itself. The use of coercion to affect public affairs brings about a greater societal harm than coercion standing alone, justifying more serious punishment.

Comment on Section 3103. Official Misconduct

Corresponding Current Provision(s): 11 Del. C. §§ 1209, 1211, 1212, 1213

Comment:

Generally. This provision creates a general offense covering situations in which public employees or officials abuse their positions by acting outside their lawful authority.

Relation to current Delaware law. Section 3103(a) directly corresponds to 11 Del. C. § 1211, with three minor differences. First, the language of § 1211 is streamlined for consistency and simplicity. The current provision uses the term "public servant" when defining who can commit the offense, but Section 3103(a) uses the broader term "person." The lengthy language in § 1211(3) is simplified in Section 3103(a)(3). Second, Section 3103(a)(2) includes the additional clause, "even if such duty is not directly related to the public servant's official functions." The addition was made in light of the Delaware Supreme Court's holdings in *Howell v. State*, 421 A.2d 892, 897 (Del. 1980). In *Howell*, the Court held that the "clearly inherent in the nature of the office" clause should be read broadly, and the current § 1211(2) (proposed Section 3103(a)(2)) is not confined to the failure of a public servant to perform her official powers, functions, or duties. Third, the extensive considerations in § 1211(3) applying to benefits to the public servant's property have been simplified. Subsection (a)(3) contains the same substance as § 1211(3), albeit with an "intentional" culpability. 11 Del. C. § 1211 predates the current Delaware criminal code, before the code contained a robust definition of its culpability requirements. At that time, the considerations contained in § 1211(3) were probably necessary in capture the seriousness of the public servant's intentions. Yet, they are not necessary today. The proposed and current definitions of "intent" regarding results are the same; in either case, it must be the actor's conscious object and subjective purpose to accomplish the stated end. "Intent" is a rigorous culpability requirement. Applied to this case, even a public servant who *knows* her property will benefit would not be guilty, if it were not also the subjective purpose for which the activity was undertaken. In those cases, no further considerations are necessary to demonstrate malfeasance.

Note that Subsection (a) does not include in the definition of official misconduct any threat to violate Section 3103. Threats relating to official misconduct are dealt with in the definition of the coercion offense in Section 1404(a)(7). That way, other offenses defined by use of "coercion"—such as extortion in Section 2104—automatically include threats to violate public trust without the need to reference additional offenses.

Section 3103(b) corresponds to current § 1212, with no substantive differences. Yet, note that because the definition of a "personal benefit" has been expanded, the situations in which a person could be convicted of profiteering have likewise expanded.

Section 3103(c) maintains § 1212's Class A misdemeanor grade for offenses under Section 3103(b) (profiteering). Yet, although § 1211 grades offenses of official misconduct as Class A misdemeanors, Section 3103(c) grades offenses under Section 3103(a) as Class 7 felonies. The grade of the official misconduct offense has been raised as the offense involves a significant violation of public trust that seems equivalent to, not less serious than, receiving a bribe.

Additionally, Section 3103(d) requires that a public servant who is convicted of violating any provision of Section 3103 forfeit his office or employment. Although this provision does not appear in the current Delaware Code, a public servant convicted of an official misconduct

offense should not be allowed to continue in office. Other offenses in Delaware already have forfeiture-of-office provisions; for instance, 11 Del. C. § 1504(b)(1) requires a person convicted of racketeering to forfeit any position or office in an enterprise that is "acquired or maintained" in violation of the racketeering statute. Because Section 3103 concerns a breach of public trust, and because an offense of racketeering (which does not necessarily involve public trust) already contains a forfeiture-of-office provision, extending a forfeiture provision to official misconduct improves the Code's consistency. Note, upon conviction (as the term defined in Section 509(b) [Definitions]), the office is forfeited immediately. See also Commentary to Section 3101(d) [Bribery].

Section 3103(d), like Section 3101(d), has been added for consistency with 11 Del. C. §§ 1502(3) and 1504(b)(1). *See* Section 3101(d) and corresponding Commentary.

Comment on Section 3104. Definitions

Corresponding Current Provision(s): 11 Del. C. §§ 1209, 1213

Comment:

Generally. This Section provides definitions of key terms used in this Chapter.

Relation to current Delaware law. Section 3104(a) provides a definition of "harm to another person" that is taken directly from 11 Del. C. § 1209(1).

Section 3104(b) provides a definition of "party officer" that is taken directly from 11 Del. C. § 1209(2).

Section 3104(c) provides a definition of "personal benefit." The definition corresponds to 11 Del. C. § 1209(3), but is modified in three minor ways. First, the definition eliminates the clause "anything regarded by the recipient" because it makes the definition subjective in a way that would be unnecessarily difficult to prove. Second, the proposed definition eliminates a clause stating that "personal benefit" does not include a "gain or advantage promised generally to a group or class of voters as a consequence of public measures which a candidate engages to support or oppose," because the definition as a whole makes clear that a gain or advantage promised to a class generally would not constitute a personal benefit. The removal of the clause is not intended to change current law. Third, the narrow connection between the offender and a benefit given to a third person has been broadened. Previously, the benefit had to be conferred on the offender's behalf, or at the offender's request: this fails to capture situations where a benefit is given to a third person under a wholly silent understanding, but which still accrues ultimately, and unlawfully, to the offender.

Section 3104(d) provides a definition of "public servant" that is taken directly from 11 Del. C. § 1209(4).

CHAPTER 3200. PERJURY AND OTHER OFFICIAL FALSIFICATION OFFENSES

Section 3201. Perjury
Section 3202. Falsification Under Penalty
Section 3203. Tampering with Public Records
Section 3204. Criminal Impersonation
Section 3205. Definitions

Comment on Section 3201. Perjury

Corresponding Current Provision(s): 11 Del. C. §§ 1209(4), 1222, 1223, 1224, 1225, 1231, 1232, 1234, 1235(c), 1235(f); *see also* 1221

Comment:

Generally. This provision defines the offense of perjury, which, like other offenses in Chapter 3200, aims to protect the integrity of information relied on during an official proceeding. Perjury is an especially serious offense because it involves falsification under an oath or equivalent affirmation.

Relation to current Delaware law. The offense definition in Section 3201(a) is substantially the same as the current perjury offenses in 11 Del. C. §§ 1222 and 1223, but incorporates the definition of "swears falsely" in § 1224 as part of the offense definition itself. The distinctions between §§ 1222 and 1223 are retained for grading purposes.

Section 3201(b) grades perjury differently depending on whether the false statement is made during live testimony or in a written instrument, and whether or not the statement is material. Subsection (b)(1) corresponds to 11 Del. C. § 1223, but directly incorporates the definition of "testimony" from § 1235(f). Subsection (b)(2) corresponds to § 1222. But, Subsection (b)(2)(A) directly incorporates the definition of "oath required by law" from § 1235(c), which makes the actual "required by law" clause unnecessary. Subsection (b)(2)(B) incorporates the "delivery" requirement from § 1224. Combining "publish as true" with the "intent to mislead a public servant in the performance of official functions" is unwieldy, so the two phrases were replaced with the more straightforward, "to deceive a public servant." Misleading "in the performance of official functions," additionally, is too narrow, because it appears to require an additional element: proof of an effect on the public servant's function. Note that because the maximum sentences attached to grade levels have changed in the Proposed Code, the 3-year maximum is no longer available.The maximum sentence either had to go up to [4] years (Class 7 felony) or down to [2] years (Class 8 felony). Class 7 felony was chosen to avoid having too big a divide between testimonial and written perjury, and to allow Section 3203 to be graded lower than written perjury, but still be a felony. Subsection (b)(3) directly corresponds to § 1221, which punishes at a lower grade false statements made under oath that are immaterial to the proceeding or matter.

Section 3201(c) directly corresponds to the affirmative defense in 11 Del. C. § 1231.

Section 3201(d) directly corresponds to the restrictions upon available defenses in 11 Del. C. § 1232.

Section 3201(e) directly corresponds to the evidentiary rules in 11 Del. C. §§ 1225 and 1234, though they have been reworded for simplicity.

Comment on Section 3202. Written Falsification Under Penalty

Corresponding Current Provision(s): 11 Del. C. §§ 1233, 1234

Comment:

Generally. Section 3202 criminalizes making a false written statement in an instrument bearing legally authorized notice that the false statement is punishable.

Relation to current Delaware law. Section 3202(a) corresponds directly to the current offense definition in 11 Del. C. § 1233 (making a false written statement). The offense has been retitled to help distinguish this offense from written perjury. Subsection (a)(2) drops the alternative culpability requirement, that the defendant "knows" the statement is false, because any time a person knows something to be false, the person necessarily also believes it to be false. 11 Del. C. § 1233 provides that "[a] person is guilty of making a false written statement when the person makes a false statement which [(1)] the person *knows* to be false or [(2)] *does not believe to be true* in a written instrument bearing a notice . . . ." (emphases added). It is unnecessary to have both "knows" and "believes" as alternative elements of the offense: an individual can believe something that is not true, and so can "believe" without satisfying a culpability requirement of "knowing." But, if someone knows, factually, that something is true, then the person necessarily also believes it to be true. Thus, the use of "believes" in the draft text covers both situations enumerated in current law. Chapter 3200 primarily punishes a defendant's subjective belief in a statement's falsehood, rather than the objective truth or falsehood of the statement.

Section 3202(b) directly corresponds to the evidentiary rule in 11 Del. C. § 1234 requiring corroborated testimony to support conviction under Section 3202.

Section 3202(c) grades the offense as a Class A misdemeanor, following 11 Del. C. § 1233. It is appropriate to grade Section 3202 lower than the written form of perjury in Section 3201 because of the different types of affirmations—required, or authorized but voluntary—involved in the two offenses.

Comment on Section 3203. Tampering with Public Records

Corresponding Current Provision(s): 11 Del. C. § 873; 16 Del. C. § 4740(g); 21 Del. C. § 4603; *see also* 7 Del. C. §§ 6013(b), 6309(j); 11 Del. C. § 876; 16 Del. C. §§7109(c); 21 Del. C. §§ 2315, 2610(g), 2620(a)–(b), 2752, 3107, 6705(b)

Comment:

Generally. This provision criminalizes activity impairing the integrity of writings relied upon during official proceedings and the tampering with public records.

Relation to current Delaware law. Section 3203(a), defining an offense involving false entries in and alterations to public documents, as well as the removal, mutilation, destruction, and concealment of public records, corresponds with 11 Del. C. § 873. Sections 3203 and 2202 (Fraudulent Tampering with Records) are similar, yet distinct in an important way. Section 3203

criminalizes tampering with public records. If a defendant satisfies the elements of Section 3203, and has the additional *intent to defraud*, then the person would be liable instead under 2202. Section 3203 is, in essence, an included offense of 2202. Section 2202 supplements proposed Section 3203 and applies to records that may not qualify as "public records." Under current Delaware law, there are two degrees of tampering with public records. The first degree, 11 Del. C. § 876, involves the "intent to defraud," while the second, 11 Del. C. § 873, does not. The two offenses have been segregated to maintain consistency amongst the proposed Chapters.

Yet, Section 3203(a) expands the current statute in two ways. First, Subsection (a)(1)(B) explicitly makes a natural extension of what it means to make a false entry by capturing the knowing failure to make an entry into a public record when one is required by law to do so. This generalizes some regulatory offenses that criminalize this behavior already, such as 16 Del. C. § 4740(g) (knowing failure to keep records of sales of pseudoephedrine or ephedrine) and 21 Del. C. § 4603 (knowing failure to submit a record of possession of a vehicle master key). Second, Subsection (a)(2)(B) makes it an offense to tamper with records that are required by law to be kept by private actors for the use or information of the government. The harm in this situation and current law is the same: the actor causes the government to receive disinformation. It does not matter who holds the record subject to tampering.

Section 3203(b) keeps the grade of the current offense.

Regulatory Offenses. Regulatory regimes depend upon submission of truthful records by regulated parties. To help ensure truthful submissions, there are several regulatory offenses punishing falsifying records either independently, or by equating that activity with perjury. Section 3203 is intended to replace all of these provisions. This is preferable to the current selection of regulatory offenses for two reasons. First, it ensures uniform punishment of all people who falsify public records. Take, for example, 21 Del. C. §§ 2610 and 6705. Section 2610(g) provides that whoever *knowingly* falsifies information in a commercial driver's license is "guilty of perjury," which is punishable by up to 3 years' imprisonment for written falsifications. Section 6705(b) and (h), by contrast, provide that whoever *intentionally* falsifies vehicle identification numbers is "guilty of a felony" and punishable by between 1 and 5 years' imprisonment. Between these two provisions, what is essentially the same behavior, as far as public records are concerned, is punished by two different maximum sentences using two different culpability requirements. These situations should be treated the same. Second, equating falsification of public records with perjury muddies the definition of perjury. By definition, perjury takes place under oath or affirmation—but public records kept or submitted are not necessarily made under oath. It is clearer to have separate offenses for these very different situations. Section 3203(b) grades the offense the same as the lowest grade of perjury. Yet, Section 3201 remains available as an alternative offense for regulatory falsifications that rise to the higher grades of perjury.

First Degree Tampering with Public Records. 11 Del. C. § 876, tamping with public records in the first degree, has not been included in Section 3203. Due its additional element of fraudulent intent, that offense is included in proposed Section 2202 (Fraudulent Tampering with Records).

Comment on Section 3204. Criminal Impersonation

Corresponding Current Provision(s): 11 Del. C. § 907(3), 907B; *see also* 6 Del. C. § 5133

Comment:

Generally. This provision defines two offenses dealing with the criminal impersonation of public servants and law enforcement or emergency personnel.

Relation to current Delaware law. Section 3204 consolidates three current provisions dealing with criminal impersonation. Subsection (a)(1) directly corresponds to 11 Del. C. § 907(3), with the general introductory language of "falsely represents" covering false identifications, badges, and uniforms specified in the current offense. Note that §§ 907(1)–(2) are not incorporated here, but are instead incorporated into Chapter 2200 due to their additional intent to defraud. Subsection (a)(2) directly incorporates 11 Del. C. § 907B, which prohibits impersonating law enforcement or emergency personnel for the purpose of facilitating the commission of an offense or enabling flight from an offense. The terms and grading provisions from § 907B incorporated without substantive changes.

Administrative Impersonation. 6 Del. C. § 5133, which prohibits impersonating and acting in certain ways that carry the authority of the Secretary of Agriculture, has not been incorporated into the Proposed Code. It is redundant with both the current offense for impersonating public servants, as well as Section 3204. Furthermore, the offenses are graded differently, with § 5133 as a Class B misdemeanor and § 907 as a Class A misdemeanor. For these reasons, the offense should be eliminated from Title 6.

Comment on Section 3205. Definitions

Corresponding Current Provision(s): 11 Del. C. §§ 222(2), 1235

Comment:

Generally. This Section provides definitions of key terms used in this Chapter.

Relation to current Delaware law. Section 3205(a) provides a definition of "oath" that directly corresponds to the definition in 11 Del. C. § 1235(b). The definition of "oath or affirmation" in § 222(20) is not incorporated because it only applies to warrant issues not contained in the Proposed Code. The definition should instead be moved to another part of the Delaware Code dealing with warrants.

Section 3205(b) provides a definition of "statement is material" that directly corresponds to the definition in 11 Del. C. § 1235(a).

CHAPTER 3300. OFFENSES INVOLVING OBSTRUCTION OF GOVERNMENTAL OPERATIONS; ESCAPE

Section 3301. Obstructing Justice
Section 3302. Resisting or Obstructing a Law Enforcement Officer
Section 3303. Obstructing Administration of Law or Other Government Function
Section 3304. Refusing to Aid an Officer
Section 3305. Escape
Section 3306. Prohibited Conduct Related to Official Custody
Section 3307. Intimidating, Improperly Influencing, or Retaliating Against a Witness, Juror, or Victim
Section 3308. Criminal Contempt
Section 3309. Definitions

Comment on Section 3301. Obstructing Justice

Corresponding Current Provision(s): 11 Del. C. §§ 1244, 1245A, 1246, 1247, 1269, 1274; *see also* 11 Del. C. §§ 850, 937; 21 Del. C. § 4202

Comment:

Generally. This provision defines the offense of obstructing justice.

Relation to current Delaware law. Section 3301(a)(1) corresponds to 11 Del. C. § 1245A(a), with one minor change. Although the current provision stipulates that the defendant must have an intent to prevent, hinder, or delay "the investigation of any crime or offense by a law-enforcement officer or agency," 11 Del. C. § 1245A(a), the proposed provision stipulates that the defendant must have an intent to prevent, hinder, or delay "the investigation, discovery, apprehension, prosecution, or defense of any person." To consolidate as many current provisions as possible and to recognize the fact that investigation is not the only stage of the law enforcement process that can be delayed or derailed by obstruction, the language of the proposed provision broadens the current provision and addresses an inconsistency within the current law, where certain obstructing actions are not adequately covered. "Any person" includes the defendant herself.

Section 3301(a)(2)(A) also corresponds to 11 Del. C. § 1245A(a), with two minor changes. First, the proposed provision replaces the current provision's clause prohibiting any "false written or oral statement" to a law enforcement officer or agency when such statement is material to the investigation, with a clause prohibiting any "false, misleading, or incomplete" such statement. The alteration reflects an incorporation of the definition of "false" currently contained in 11 Del. C. § 1245A(b)(2). Second, the proposed provision does not include § 1245A(b)(1) because the meaning of "statement" is apparent, or §§ 1245A(b)(3)–(4) because the definition of "statement is material" covers those definitions.

Section 3301(a)(2)(B), (C), (D), and (E) correspond to 11 Del. C. §§ 1244(a)(1), (2), (3), and (4), respectively, with four minor changes. First, the proposed provisions remove the current provisions' requirement that the person has committed a crime or is being sought by law enforcement because that requirement is implied by the current provisions' requirement that the person *intend* to "prevent, hinder, or delay the investigation, discovery, apprehension,

prosecution, or defense of any person." Second, Subsection (a)(2)(E) streamlines the language contained in 11 Del. C. § 1244(a)(4). Third, the proposed provisions do not include 11 Del. C. § 1244(a)(6)'s prohibition of aiding the person "to protect or profit expeditiously from an advantage derived from the person's crime" because the prohibition overlaps with accomplice liability to the extent that protecting the criminal's "advantage" is itself an offense. Finally, the term "discovery," used in § 1244, has been omitted from Subsections (a)(2)(C)–(E) because it is unnecessary given the way Section 3301 is drafted. The offense can be satisfied by the defendant hindering or delaying apprehension of another person, and aiding the person to evade discovery by law enforcement hinders or delays apprehension.

Section 3301(a)(2)(F) corresponds to 11 Del. C. § 1246, with three minor changes. First, the proposed provision removes the current provision's "offer" and "agree" language because solicitation and conspiracy are covered by the inchoate offenses in Chapter 700. Second, the proposed provision removes the current provision's sentence adjustment language because that language is redundant with the bribery offense in Section 3101, which is already graded higher. This form of obstruction only differs from bribery if it is the victim or a similarly situated civilian who is affecting the prosecution, rather than a public servant. The phrase "not being a public servant" has been added to this Subsection to clarify the distinction between this offense and bribery. Third, although the current provision is only a class A misdemeanor, the proposed provision is graded the same as the other forms of obstruction, given its similarity to those provisions.

Section 3301(a)(2)(G) corresponds to 11 Del. C. § 1244(a)(5) and 11 Del. C. § 1269, which one minor change. The proposed provision does not specifically incorporate the current provisions' culpability requirements because those requirements are redundant in light of the proposed provision's overall requirement that the defendant have "intent to prevent, hinder, or delay the investigation, discovery, apprehension, prosecution, or defense of any person."

Section 3301(a)(2)(H) is based upon 11 Del. C. § 850(a)(1)b. and 11 Del. C. §§ 937(2)-(4). The unifying features of those provisions add up to an electronic obstruction of justice offense, which is lacking in the current criminal code.

Section 3301(a)(2)(I) is a summary of 21 Del. C. §§ 4202(a)-(c), with two minor changes. First, the proposed provision adds this Section's overall intent requirement. 21 Del. C. § 4202 does not have an explicit culpability requirement, but by virtue of its inclusion in Section 3301, the general culpability requirement in Subsection (a)(1) applies to it. Adding an intent requirement to a hit and run offense does not substantially alter the purpose of the law, since individuals "run" during a hit and run because they intend to avoid questioning and investigation by law enforcement. Second, the proposed provision does not include the current provision's duty to aid requirement. 21 Del. C. § 4202 is ambiguous in that it appears to contain two separate issues: (1) evading investigation (i.e., obstruction), and (2) a duty to render aid to the person injured. But, Delaware does not appear to impose a general duty to aid victims of one's injurious behavior. Based on a search of applicable case law, 21 Del. C. § 4202 is used predominately to prosecute individuals for fleeing, not for failure to render aid. Therefore, only the flight aspect of § 4202 is maintained in the proposed provision.

Section 3301(b) maintains the grading provisions set forth in 11 Del. C. §§ 1244(b)-(c) and § 1245(A), except as noted above.

Section 3301(c) is substantially similar to 11 Del. C. § 1247.

Comment on Section 3302. Resisting or Obstructing a Law Enforcement Officer

Corresponding Current Provision(s): 11 Del. C. §§ 1243, 1250, 1257, 1257A, 1458; 21 Del. C. § 4103

Comment:

Generally. This provision criminalizes resisting, obstructing, or interfering with a law enforcement officer. The proposed offense is a generalization based upon the above referenced current provisions; it captures much more behavior than the few scattered, overly specific offenses currently do, promoting comprehensive protection of law enforcement and emergency personnel.

Relation to current Delaware law. Section 3302(a) covers broad behaviors, including resisting arrest. The proposed provision does not specify who the target of the official's action is, so the offense of interfering with the arrest of another person currently prohibited by 11 Del. C. § 1257 is captured by Section 3302(a)(1). Note that the act being resisted or obstructed need only be within the scope of the official's employment, not be specifically authorized in the instance involved in the offense. This means that a person who resists an unlawful arrest by a peace officer (who would also be a law enforcement officer, and thus include in the prohibitions in Section 3302) may still be prosecuted under Section 3302—preserving Delaware's current rule—so long as the official's employment generally authorizes him or her to make arrests. The same rationale applies to other key acts of law enforcement officers, correctional officers, firefighters, and emergency personnel, in addition to arrests by peace officers.

Knowledge of the law enforcement officer's identity is required by Section 3302(a)(2), in accord with the requirement of 11 Del. C. § 1458(a)(1) and the implied requirement of 21 Del. C. § 4103(b). Extending the knowledge requirement to other offenses falling within this Section promotes consistency with other current obstruction provisions.

Section 3302(a) captures the offenses against law enforcement animals prohibited by 11 Del. C. § 1250 to the extent that the conduct obstructs a law enforcement officer in charge of the animal. To the extent that § 1250 is concerned merely with injury to animals, proposed Section 4207 (Cruelty to Animals) is available. Section 3302(a) also captures 11 Del. C. § 1257A's offense of using an animal to avoid capture, including its grading provision that deals with injuring a law enforcement officer.

Section 3302(b) maintains the grading provisions set forth in the current criminal code, except as noted below. Section 3302(b)(1) corresponds to 11 Del. C. § 1458(b). The word "weapon," without qualification, is used in place of the list of possible weapons in current law to emphasize the fact that it is the person being disarmed that makes this such a serious offense. The particular weapon the officer is disarmed of is irrelevant; disarming an officer of any weapon makes the officer more vulnerable to attack or interference, whether it be a firearm, Taser, pepper spray, or anything else. Section 3302(b)(2) corresponds to 11 Del. C. § 1257(a). The proposed Section 3302(b)(2) summarizes the behavior listed in the current § 1257(a). In keeping with this offense's general character, this grade provision no longer applies only to arrests. Section 3302(b)(3) corresponds to 11 Del. C. §§ 1243 and 1257(b) and 21 Del. C. § 4103(b). 11 Del. C. § 1243, which prohibits obstructing firefighting, and 11 Del. C. § 1257(b), which prohibits resisting arrest, are class A misdemeanors, while 21 Del. C. § 4103(b) is a class G felony. The lower grade is appropriate because the scope of the proposed offense has been expanded to capture more conduct. The repeat offense grade provisions from 21 Del. C.

§ 4103(b) are not included because proposed Section 804 contains a general adjustment for repeat offenses. License revocation as an additional penalty in motor vehicle cases, however, should remain in Title 21.

Comment on Section 3303. Obstructing Administration of Law or Other Government Function

Corresponding Current Provision(s): 6 Del. C. § 5132; 11 Del. C. §§ 1248, 1267, 1273; 16 Del. C. § 4759

Comment:

Generally. This provision defines the offense of obstructing administration of law or other government function. It criminalizes intentionally interfering with government functions by physical means, breach of an official duty, or an unlawful act.

Relation to current Delaware law. Delaware does not currently have a general offense dealing with obstruction of administration of law or other government function, but instead has several specific statutes dealing with particular instances of obstruction. Those offenses speak to a core concern of the General Assembly that would be better served by a general offense, because relying upon specialized statutes results in gaps in criminalization. The core concern of governmental obstruction is blameworthy regardless of the particular form it takes.

Section 3303(a) corresponds to, but generalizes, the conduct currently prohibited by 6 Del. C. § 5132, which relates to obstructing the enforcement powers of the Department of Agriculture; 11 Del. C. § 1248, which relates to obstructing the control and suppression of rabies; 11 Del. C. § 1267, which relates to misconduct by a juror; and 11 Del. C. § 1273, which relates to unlawful grand jury disclosure.

Subsections (a)(2) and (b)(3) correspond to 11 Del. C. § 1267, as jurors have official duties of secrecy and impartiality, and 11 Del. C. § 1273, as long as the duty of grand jury secrecy is defined elsewhere in Delaware law. (Current § 1273 requires that the matter be "required by law to be kept secret," which points to another source of law.) 11 Del. C. § 1268, which relates to communication between jurors, is not included because a juror's duty of secrecy does not prohibit communication among jurors "in the same proceeding with regard to matters admitted as evidence in the proceeding."

Section 3303(b) generally maintains the grading provisions set forth in the current code. Section 3303(b)(1) corresponds to 11 Del. C. § 1248, relating to the suppression and control of rabies outbreaks, but generalizes current law to include obstruction of official action to address any viral outbreak or other, similarly serious public health emergencies. Section 3303(b)(2) directly corresponds to 16 Del. C. § 4759(a)(4). Section 3303(b)(3) directly corresponds to 11 Del. C. § 1267. The default grading provision contained in Section 3303(b)(4) corresponds to 11 Del. C. §§ 1273 and 1248(b). The conduct currently covered by 6 Del. C. § 5132 also falls under this default grading provision, though the result is that the maximum punishment for that conduct is raised by three months.

Comment on Section 3304. Refusing to Aid an Officer

Corresponding Current Provision(s): 11 Del. C. §§ 1241, 1242

Comment:

Generally. This provision criminalizes the knowing failure to provide reasonable assistance to a law enforcement officer in apprehending a person or preventing an offense when so commanded.

Relation to current Delaware law. Sections 3304(a) and (b) directly correspond to 11 Del. C. § 1241, except with an alteration in the reasonableness requirement in rendering aid. 11 Del. C. §1241 prohibits an "unreasonabl[e] fail[ure] or refus[al] to aid . . . [a] police officer [upon a lawful command to do so] in effecting an arrest, or in preventing the commission by another person of any offense." Thus, under current Delaware law, the failure to render aid must not be unreasonable. But, proposed Section 3304(a)(1) moves the reasonableness requirement to the aid itself; under the proposed section, the aid rendered must itself be reasonable. An "unreasonable" failure to render aid would include every instance of culpable failure, including negligence. Under § 1241, a person who fails to render aid due to her own negligence could be liable. But if the officer identifies himself, or is identifiable as an officer; the officer commands a person to render aid; and the defendant subsequently refuses to do so, the defendant would, at minimum, *knowingly* fail to assist the officer. The reasonableness requirement has been moved to the aid itself because: (1) negligence is a disfavored culpability in criminal law, and was probably not intended by the General Assembly to apply to § 1241; and (2) it would be irrational for the law to require an individual to render more than reasonable assistance, which could include putting himself or herself in harm's way.

Section 3304(c) corresponds to 11 Del. C. § 1242, with two minor changes. First, the proposed provision does not include the current provision's clause "provided, that the person employs means which would have been employed by a reasonable person under the circumstances known to the person at the time" because the proposed offense already requires the aid to have been reasonable. Second, the proposed provision does not include 11 Del. C. § 1242(b) because that provision should be included in a regulatory title dealing with blood-alcohol tests, such as Title 21. Section 1242(b) has no relationship to this offense or to the current criminal code.

Comment on Section 3305. Escape

Corresponding Current Provision(s): 11 Del. C. §§ 1251, 1252, 1253, 1258

Comment:

Generally. This provision criminalizes escaping from custody.

Relation to current Delaware law. Current escape provisions are unnecessarily convoluted. For example, the current provisions use the term "custody" to mean several different things, despite it being a defined term. Section 3305(a) represents an attempt to maintain current law while creating rational distinctions between the different forms of confinement.

Section 3305(a)(1)(A) is based upon 11 Del. C. § 1253 and the definition of "detention facility" in 11 Del. C. § 1258(3). The term "imprisoned" is used to emphasize a distinction

between Subsection (a)(1)(A) and (a)(1)(B) regarding the kinds of penal custody that may be involved. Subsection (a)(1)(A) is intended to apply only to escape from incarceration, whereas Subsection (a)(1)(B) applies more broadly to other kinds of penal custody, such as house arrest or work release.

Section 3305(a)(1)(B) is based upon 11 Del. C. § 1252 and the definition of "detention facility" in 11 Del. C. § 1258(3).

Sections 3305(a)(1)(C) and (D) are based upon 11 Del. C. § 1251 and the definition of "custody" in 11 Del. C. § 1258(2).

The requirement in Section 3305(a)(2) that the person must know that he or she is not permitted to escape is based on the definition of "escape" in 11 Del. C. § 1258(4) and its requirement that the actor have knowledge that the escape is not permitted.

Section 3305(b)(1) maintains the grading provisions set forth in 11 Del. C. § 1253. Section 3305(b)(2) maintains the grading provisions set forth in 11 Del. C. § 1252. Section 3305(b)(3) maintains the grading provisions set forth in 11 Del. C. § 1251.

Comment on Section 3306. Prohibited Conduct Related to Official Custody

Corresponding Current Provision(s): 11 Del. C. §§ 1256, 1258, 1260

Comment:

Generally. This provision criminalizes possessing prison contraband and misusing prisoner mail.

Relation to current Delaware law. Section 3306(a) corresponds to 11 Del. C. § 1256, with two minor changes. First, the proposed provision's knowledge requirement is reworked to make more sense in context. Although current § 1256 uses "knowingly and unlawfully" to qualify "introduces any contraband" and "makes, obtains, or possesses any contraband," Section 3306(a)(1) incorporates the knowledge requirement by using the phrase "what the person knows to be contraband." Second, Section 3306(a) converts "unlawfully" into "except as authorized by law," because this default is more logical than forcing prosecutors to prove outright that the contraband was unlawful.

Section 3306(b) corresponds to 11 Del. C. § 1260, with one minor change. Current § 1260's repeat offense provision is not included as proposed Section 804 contains a general adjustment for repeat offenses.

Section 3306(c) maintains the grades from 11 Del. C. §§ 1256 and 1260, with the exception of the repeat offense provision, as noted above. But, Subsection (c)(1) proposes a higher grade for introducing deadly weapons as contraband, because having a deadly weapon in prison is a much more serious threat to others' safety than having a mobile phone.

Comment on Section 3307. Intimidating, Improperly Influencing, or Retaliating Against a Witness, Juror, or Victim

Corresponding Current Provision(s): 11 Del. C. §§ 1263, 1263A, 1266, 1268, 3531, 3532, 3533, 3534

Comment:

Generally. This provision criminalizes the performance of certain conduct that harmfully interferes with the duties of public servants, witnesses, jurors, and voters.

Relation to current Delaware law. The proposed offense is a composite offense that generalizes portions of the current offenses of witness intimidation (11 Del. C. §§ 3532, 3533, and 3534), witness tampering (11 Del. C. §§ 1263 and 1263A), and juror tampering (11 Del. C. § 1266). Generally, this Section expands conduct which was previously limited to a narrower subset of targets; for instance, intimidation, deception, persuasion, and retaliation, which currently only apply to witnesses, has been expanded to encompass jurors, and unauthorized communication, which currently only applies to jurors, can now apply to witnesses.

Section 3307(a)(1)(A) is based upon 11 Del. C. § 1263(1).

Section 3307(a)(1)(B) is based upon 11 Del. C. §§ 1263(1), 1263A(a), and 3532. "Testifying freely" includes influencing the witness's availability.

Section 3307(a)(1)(C) is based upon 11 Del. C. § 3532. The proposed clause "annoy, harass, intimidate" is largely based on the definition of malice currently set forth in 11 Del. C. § 3531(1).

Section 3307(a)(1)(D) is based upon 11 Del. C. §§ 3532(1)–(3).

Section 3307(a)(2)(A) is based upon 11 Del. C. §§ 1263(2) and 3533(1), the grades for which diverge. The proposed provision preserves the higher grading of Class 4 felony for this conduct. "Anyone" includes any witness, juror, or third person.

Section 3307(a)(2)(B) is based upon 11 Del. C. § 1263. The proposed clause "commits an offense" includes property damage, which is referenced in 11 Del. C. § 1263(2).

Section 3307(a)(2)(C) is based upon 11 Del. C. § 1266(1). 11 Del. C. § 1266(2) is not included because bribing a juror to violate a duty of confidentiality would fall under the general bribery provision set forth in Section 3101, where it is punished more harshly.

Section 3307(b) preserves the exception for juror deliberations set forth in 11 Del. C. § 1268.

Several current provisions are not included in the proposed provisions. First, 11 Del. C. § 1263A, which relates to tampering with child witnesses, is not included because the activity is already covered by the general offenses in this Section. In addition, the current offense of child tampering is punished less harshly than the offense of tampering with adult witnesses, even when the child witness is the complaining witness. Second, 11 Del. C. § 3533(3) is not included because proposed Section 804 contains a general adjustment for repeat offenses. Third, 11 Del. C. § 3534, which prohibits an attempt to intimidate a witness, victim, or juror, is not included because attempt liability is covered comprehensively by proposed Section 701.

Section 3307(c) seeks to generally preserve the grading of current offenses based on the conduct involved, not the status of the victim. Where the current grades conflict, the proposed provision incorporates the lower grade. The lower grade was chosen as a proportionality judgment by the nonpartisan consultative group supervising the drafting process for this Proposed Code. That group has scrutinized the relative grading of all offenses, and has decided

that this offense's grade would otherwise be disproportionately high when compared to other offenses of the same grade in current law. Note that the legislation authorizing this Proposed Code mandates that "disproportionate" statutes be identified and rectified.

Comment on Section 3308. Criminal Contempt

Corresponding Current Provision(s): 11 Del. C. §§ 1271, 1271A, 1272

Comment:

Generally. This provision defines the offense of criminal contempt.

Relation to current Delaware law. Section 3308(a) corresponds to 11 Del. C. § 1271, with one minor change. Section 3308(a)(8) adds for clarity the word "order" to the current provision's clause "process, injunction or other mandate of a court" because orders are common court mandates. Because this Subsection specifies that the disobedience of any order of any court forms the basis of contempt, 11 Del. C. § 1271A is unnecessary except under the aggravating conditions of § 1271A(c). Therefore, § 1271A has been included only as a grade aggravation.

Section 3308(b) maintains the grading provisions set forth in 11 Del. C. §§ 1271 and 1271A. The proposed provision does not specify that the conduct must have occurred in Delaware, as § 1271A does, because Section 105 covers all territorial and jurisdictional issues. In addition, the proposed provision does not include §§ 1271A(d)-(e) because all minimum sentencing provisions in the Proposed Code are set forth in Section 802.

Section 3308(c) directly corresponds to 11 Del. C. § 1272.

Comment on Section 3309. Definitions

Corresponding Current Provision(s): 11 Del. C. §§ 222(15), 1251, 1252, 1253, 1258, 1266, 1274, 3531

Comment:

Generally. This Section provides definitions of key terms used in this Chapter.

Relation to current Delaware law. Section 3309(a) corresponds to the definition of "contraband" in 11 Del. C. § 1258(1), with one minor difference. The proposed definition adds "mobile phone or other electronic device" to the list of items that constitute contraband because of those devices' use in grading 11 Del. C. § 1256.

Section 3309(b) directly corresponds to the definition of "juror" in 11 Del. C. § 1266. Including this definition is necessary because it expands the apparent meaning of juror from one who is actually chosen to serve on a jury to one who has received notice of summons to appear for jury service.

Section 3309(c) is a generalization of all the specific examples of persons who constitute a "law enforcement officer" in 11 Del. C. § 222(15). With this generalization and the removal of a specifically enumerated list of persons who qualify as law enforcement officers, no person who should fall under this title will be inadvertently omitted. Note that this is intended to be a very broad group of people, whereas "peace officers"—a subset of law enforcement officers—are defined much more narrowly as a class.

Section 3309(d) provides a newly-promulgated definition of "peace officer," which has been created to capture a useful description of a peace officer based upon peace officers' unique duties and source of authority. "Peace officers" are a subset of "law enforcement officers," and are generally understood to be "charged . . . with the maintenance of the public peace and order [and] . . . the preservation of the safety of person and property within their jurisdiction," *State v. Wyatt*, 27 Del. 473, 89 A. 217, 219 (Gen. Sess. 1913), and "ha[ve] the right to seize and search any person whom the officer observes breaking the law." *Jones v. State*, 745 A.2d 856, 872 (Del. 1999). Peace officers are mainly distinguished by their arrest authority, regardless of whether that authority extends to all or a limited number of offenses, and regardless the jurisdiction where that arrest authority is established. On the other hand, a "law enforcement officer" can be anyone directly involved in the criminal justice system, whether that means the prevention, detection, investigation, or prosecution of offenses.

Section 3309(e) provides a definition of "penal custody," which is based upon the forms of correctional custody described in 11 Del. C. §§ 1251–53.

Section 3309(f) directly corresponds to the definition of "physical evidence" in 11 Del. C. § 1274(3).

Section 3309(g) summarizes the definition of "witness" set forth in 11 Del. C. § 3531(3).

OFFENSES AGAINST PUBLIC HEALTH, ORDER, AND DECENCY

CHAPTER 4100. OFFENSES AGAINST PUBLIC ORDER AND SAFETY

Section 4101. Riot; Disorderly Conduct; Failure to Disperse
Section 4102. Public Alarms
Section 4103. Stalking; Harassment
Section 4104. Public Intoxication
Section 4105. Loitering
Section 4106. Obstructing Public Ways
Section 4107. Desecration
Section 4108. Definitions

General Comment on Chapter 4100.

Current Provisions Not Incorporated. Several current provisions have not been incorporated into this Chapter. First, the current offense criminalizing hate crimes, 11 Del. C. § 1304, has not been included in this Chapter and has instead been incorporated in Section 804 as a general grade adjustment. Second, the offenses criminalizing the willful obstruction of hunting, 7 Del. C. § 724, and hunting from aircraft, 2 Del. C. § 310, have not been included in the Proposed Code, because the two offenses are regulatory in nature and should remain in a regulatory part of the Delaware Code. Third, the offense criminalizing the maintenance of dangerous animals, 11 Del. C. § 1327, has not been included in this Chapter because the offense is already adequately addressed by various proposed offenses dealing with cruelty to animals, assault, homicide, endangerment, and property damage. Fourth, 11 Del. C. § 1316, providing for registration of out-of-state liquor agents and violations for failure to register, is not really a criminal law provision at all. It is a regulation of liquor sales, and no criminal penalties are authorized for its violation. This provision should be moved to a regulatory title dealing with liquor.

Comment on Section 4101. Riot; Disorderly Conduct; Failure to Disperse

Corresponding Current Provision(s): 11 Del. C. §§ 1301, 1302, 1303

Comment:

Generally. This provision defines and criminalizes disorderly conduct, the failure to disperse, and riot, which are distinct but closely related offenses.

Disorderly conduct defines an offense to cover situations where persons engage in public conduct that is intended to cause or create a risk of public inconvenience, annoyance, or alarm.

Failure to disperse defines an offense in situations where a group of two or more persons engaged in a course of disorderly conduct likely to cause substantial harm, inconvenience, annoyance, or alarm fail to disperse upon order by law enforcement authorities.

The proposed riot offense, which is framed as an aggravated form of disorderly conduct, punishes two or more people who engage in disorderly conduct with intent to commit or

facilitate the commission of an offense, with intent to prevent or coerce official action, or in which the person knows a firearm or other deadly weapon will be used. Riot need not be defined as a separate offense because the offenses of disorderly conduct, conspiracy, and attempt adequately cover the riot offense's elements of creating a public disturbance and collaboration toward a criminal end. Riot is included as a grading adjustment to reflect the greater threat of danger posed by disorderly conduct in which persons involved have intent to commit a crime, intent to prevent or coerce official action, or in which the person knows a deadly weapon will be used.

Relation to current Delaware law. Section 4101 combines the disorderly conduct, failure to disperse, and riot offenses, which current Delaware law separates, into one provision.

Section 4101(a) corresponds to 11 Del. C. § 1301, with one change. While 11 Del. C. §§ 1301(1)a.-c. and (1)f. are incorporated verbatim in Subsections (a)(1)-(4), §§ 1301(1)d., (1)e., and (1)g. have not been included in this Subsection. 11 Del. C. § 1301(1)d.'s prohibition on obstructing vehicular or pedestrian traffic is incorporated into proposed Section 4108(b)'s definition of "public passage." 11 Del. C. §§ 1301(1)e. has not been included in this Subsection as the offense has been replaced by Section 4101(b), which deals with failure to disperse.

Section 4101(b) criminalizes, for a person participating in an offense under Subsection (a), refusing to obey the order of a peace officer to disperse. Section 4101(b) corresponds to 11 Del. C. § 1301(2), with substantially similar offense and culpability requirements. Yet, the phrase "that is likely to cause substantial harm or serious inconvenience, annoyance, or alarm" has not been included. The phrase is substantially the same as the definition of Disorderly Conduct, making it redundant. The only difference is the use of the adjectives "substantial" and "serious," which could be interpreted to require extra-disorderly conduct. That interpretation produces the irrational result of failing to criminalize Failure to Disperse following a normal Disorderly Conduct offense.

Section 4101(c) corresponds largely to 11 Del. C. §§ 1302 and 1303. Section 4101(c)(1) corresponds to § 1302, which has been incorporated as a grade adjustment to the overall disorderly conduct offense, instead of as a separate offense altogether. The offense requirements, culpability requirements, and grading of Section 4101(c)(1) and § 1302 are identical.

Section 4101(c)(2) corresponds to 11 Del. C. § 1303, with three alterations. First, § 1303(b) has not been included because its stipulation that the offense "applies to conduct within 1 hour preceding, during, and within 2 hours after a funeral, memorial service, funeral procession, or burial" is unnecessary in light of the text of the proposed offense. Because the proposed offense only applies when a person "intentionally disturbs or disrupts a funeral, memorial service, or funeral procession" or "directs abusive epithets or makes threatening gestures, knowing that the speech or conduct is likely to provoke a violent reaction," the offense need not include additional specific temporal restrictions. Second, § 1303(c)'s additional penalty for second or subsequent offenses has not been retained. All repeat offender grade adjustments are addressed by a general adjustment in Section 804 of the Proposed Code, applies to all offenses generally. Third, § 1303(d) has not been included. There is no need to preclude any county or municipality from legislating or enforcing stricter laws as the Proposed Code has no default setting of preclusion that would make this necessary. Apart from these differences, Section 4101(c)(2) adopts the spatial requirements and grading levels of § 1303.

The grading of the base disorderly conduct offense contained in proposed Section 4101(c)(4) is a Class D misdemeanor, which corresponds to 11 Del. C. § 1301. The change in grade from an unclassified misdemeanor to a Class D misdemeanor is one of form, not

substance, because Class D misdemeanors in the Proposed Code represent the same grade as an unclassified misdemeanor in the current code. But, the grading of the failure to disperse offense in proposed Section 4101(c)(3) has been raised from a Class D misdemeanor, the grade provided for in 11 Del. C. §1301, to a Class C misdemeanor. The failure to disperse offense defines a narrower and more harmful subset of behavior than does the disorderly conduct offense (conduct under Subsection (a) "likely to cause substantial harm or serious inconvenience, annoyance, or alarm" as compared to conduct that creates or is intended to create "a risk of public inconvenience, annoyance, or alarm"). Accordingly, the failure to disperse offense should be graded more seriously than the disorderly conduct offense. This grade difference appears in the Model Penal Code, on which § 1301 is based, so it seems likely that a drafting error is responsible for § 1301 grading disorderly conduct and failure to disperse the same.

Comment on Section 4102. Public Alarms

Corresponding Current Provision(s): 11 Del. C. § 1245; *see also* 11 Del. C. §§ 621, 1313

Comment:

Generally. This provision criminalizes falsely reporting public alarms and making false statements which are likely to cause serious public inconvenience.

Relation to current Delaware law. Section 4102 corresponds to 11 Del. C. §§ 621, 1245, and 1313. The intent requirement in Section 4102(a), that the defendant know that the report, warning, or call is false or baseless, directly corresponds to § 1245.

Section 4102(a)(1) and Subsection (a)(1)(A) correspond directly to 11 Del. C. § 1245(1). Subsection (a)(1)(A) also incorporates 11 Del. C. § 621(a)(2)a.-c., which criminalize making false statements that are likely to cause an evacuation of a building or cause serious inconvenience. The "law enforcement officer, agency, or other public safety official" found in Subsection (a)(1)(B) is the equivalent of § 1245(2)'s "organization having the function of dealing with emergencies involving danger to life or property." Subsection (a)(2) directly corresponds to 11 Del. C. § 1245(4).

Section 4102(b) maintains 11 Del. C. § 1245's Class A misdemeanor grade. Mandatory fines or repeat offense grades are handled by the general provisions in Chapter 800.

Current Provisions Not Incorporated. 11 Del. C. § 1313(b), which criminalizes the malicious interference with emergency communications, has not been included in this Section because the conduct constituting the offense is adequately criminalized by proposed Section 3304(a)(1). That Section prohibits "knowingly obstruct[ing], impair[ing], or pervert[ing] the administration of law or other governmental function" and requires a lower culpability level than the "intent[]" specified in current §§ 1313(b)(1) and (2).

Comment on Section 4103. Stalking; Harassment

Corresponding Current Provision(s): 11 Del. C. §§ 1311, 1312

Comment:

Generally. This provision criminalizes harassment and stalking.

Relation to current Delaware law. Section 4103 corresponds to 11 Del. C. §§ 1311 and 1312. Subsection (a)(1) corresponds to § 1311(a)(1)–(3), but is framed more broadly than the current provisions for two reasons. Although current § 1311(a) specifies certain vehicles of harassment, including through a telephone, telegraph, mail, or other form of written or electronic communication, the proposed provision criminalizes all "communications" meant to harass, annoy, or alarm another will ensure that electronic communications are captured because limiting the offense to the enumerated forms of communication is too specific and other means of harassing communications are worthy of punishment. Second, Subsection (a)(1)(A) has been framed in more precise language, to differentiate the offense from the more general catch-all provision of Subsection (a)(1)(B).

Subsection (a)(2) corresponds to elements of the stalking offense in 11 Del. C. § 1312. As stalking is a specific form of harassment, Subsection (a)(2) incorporates the definition of stalking from § 1312(a) and (e)(1). Under current law, knowingly interfering with the activities or property of another in a manner that would cause a reasonable person fear of physical injury or substantial mental distress is neither stalking (as it requires three separate incidents), nor harassment (as it requires intent to harras or annoy). Subsection (a)(2) makes clear that such conduct constitutes harassment under the Proposed Code.

Note that § 1311(a)(3) has not been included in Section 4103. Current § 1311(a)(3)'s prohibition on knowingly permitting a telephone under a person's control to be used for a purpose prohibited by this Section has not been retained. If a person permits his or her telephone to be used for harassment, sexual harassment, or stalking, *intending* that the telephone be used for that purpose, then the person is subject to accomplice liability under proposed Section 211. Current § 1311(a)(3) essentially circumvents the requirements of complicity by lowering the culpability requirement to "knowing," but the requirements of complicity are important to maintain because they define the minimum amount of involvement and culpability necessary to justifiably hold someone accountable for another person's conduct. There is no compelling justification for an exception to the general principles of accomplice liability in this case.

Section 4103(a)(3) corresponds to 11 Del. C. § 1312(i), which provides an affirmative defense for defendants engaged in lawful picketing. The defense has been made applicable to the entire Subsection criminalizing harassment.

Section 4103(b)(1) corresponds to the remaining elements of the stalking offense in 11 Del. C. § 1312. The Proposed Code treats stalking as an aggravated grade of harassment and maintains the current offense's Class F felony grade (here, a Class 8 felony). Yet, proposed Subsection (b)(1) does not retain certain grade aggravations that appear in current § 1312(c)-(d). First, the current grade aggravations for causing physical injury are not retained because causing physical injury constitutes assault, which is punishable under proposed Section 1202. Second, the current grade aggravations for victims over the age of 62 are not retained because aggravations for vulnerable victims are covered by a general grade adjustment in proposed Section 804. Third, the Class 5 felony aggravation for possessing a deadly weapon is not retained because it ensures disproportionate punishment, considering that the weapon need not be displayed or used. If the person *displays* a deadly weapon, that menacing conduct would be separately punishable under Section 1207(a)(2), but only as a Class 8 felony. Current § 1312(c)(1)-(2)'s aggravation relating to violating orders prohibiting contact with the victim and to persons 21 or older and victims under 14 are incorporated into proposed Subsection (b)(1)(B). Subsection (b)(1) also differs from current § 1312 in three other minor ways. First, it simplifies the current provision's definition of "course of conduct" by incorporating it into the grade

definition itself, rather than relying on a defined term. Second, the minimum sentencing provisions have not been retained because all minimum sentencing provisions in the Proposed Code are set forth in Section 802. Third, § 1312(j) has not been retained because its exception is already covered by Section 303's justification defense for execution of public duty. Subsection (b)(2) corresponds to § 1311(b) and maintains the same grade (Class A misdemeanor) as current law.

No Defense for Lack of Notice. Section 4103 does not incorporate 11 Del. C. § 1312(h), which provides that it shall not be a defense to a stalking prosecution that the defendant was not given actual notice that the course of conduct was unwanted or that the defendant did not intend to cause the victim fear or other emotional distress. Such a defense is fundamentally inconsistent with the culpability requirement of the offense, which is that the defendant "knowingly engage" in the course of conduct. Retaining the current provision would make stalking a strict liability offense as to the resulting fear or alarm.

Comment on Section 4104. Public Intoxication

Corresponding Current Provision(s): 11 Del. C. § 1315; *see also* 11 Del. C. § 1330

Comment:

Generally. This provision criminalizes public intoxication.

Relation to current Delaware law. Section 4104 corresponds to 11 Del. C. §§ 1315. The offense language of Section 4104(a) is incorporated verbatim from § 1315. The grading in Section 4104(b) is also incorporated verbatim from § 1315. Note that § 1315's provision relating to repeat offenders has not been retained because all repeat offense grade aggravations are dealt with by a general adjustment in Section 804.

Smoking on Trolleys. 11 Del. C. § 1330, the prohibition on smoking on trolleys or buses, has not been included. The offense is more akin to an administrative regulation because the penalty is a fine between $5 and $25. As such, the offense should be relocated to a regulatory title, rather than remain in the criminal Code.

Comment on Section 4105. Loitering

Corresponding Current Provision(s): 11 Del. C. §§ 787, 1320, 1321

Comment:

Generally. This Section defines an offense that penalizes persons who remain in one place, at a time or in a manner not usual for law-abiding citizens, under circumstances that warrant alarm for the safety of persons or property in the area.

The offense's potentially wide scope is limited in two ways. First, Section 4105(b) requires, when practical, that peace officers ask the person to identify herself and explain her presence and conduct. Second, Section 4105(c) prevents the person from being convicted where the officer did not comply with Section 4105(b), or where it appears that the defendant's explanation was true and, if believed by the peace officer at the time, would have dispelled the alarm.

Relation to current Delaware law. Section 4105 corresponds to 11 Del. C. §§ 1320 and 1321. Instead of enumerating specific situations where one can be convicted of loitering, as is done in § 1321(1)–(5), Section 4105 simplifies offense by restructuring it around the catch-all provision in § 1321(6). This provision includes each of the specific situations enumerated before it in § 1321. Under Subsection (a), a person commits an offense if he or she (1) loiters, congregates with others, or prowls, (2) in a place, at a time, or in a manner not usual for law-abiding individuals, and (3) under circumstances that warrant alarm for the safety of persons or property in the vicinity. Section 4105 combines current 11 Del. C. § 1321 and § 1320 by implicitly including "state-supported school, college or university" in the ambit of Subsection (a)(2) and (a)(3).

Section 4105(b) corresponds to the exception provision currently found in 11 Del. C. § 1321(6), which mandates that, unless circumstances make it impracticable, a peace officer shall afford the defendant an opportunity to dispel any alarm that would otherwise be warranted, by requesting identification and an explanation of the person's presence and conduct. Subsection (b) incorporates this exception to liability and makes it applicable to the entire loitering offense.

Section 4105(c) also corresponds to the exception provision in 11 Del. C. § 1321(6), which mandates that no person shall be convicted of an offense under this Section if the peace officer did not afford the person an opportunity to dispel any alarm, or if it appears at trial that the explanation given by the defendant was true and, if believed by the peace officer at the time, would have dispelled the alarm. Like Subsection (b), Subsection (c) incorporates this exception to liability and makes it applicable to the entire loitering offense.

Section 4105(d) corresponds to 11 Del. C. § 787(h), providing a defense to prosecution under this Section when the defendant committed the act as a direct result of being a victim of human trafficking.

Section 4105(e) sets the grading level of the offense as a violation and corresponds directly with the levels set by 11 Del. C. §§ 1320 and 1321.

Comment on Section 4106. Obstructing Public Ways

Corresponding Current Provision(s): 11 Del. C. §§ 1323, 1324; *see also* 11 Del. C. § 1322; 31 Del. C. § 2117

Comment:

Generally. This provision criminalizes the obstruction of public ways.

Relation to current Delaware law. Section 4106 corresponds to 11 Del. C. §§ 1323 and 1324. Current § 1323 criminalizes the obstruction of public passages, while current § 1324 criminalizes the obstruction of an ingress to or egress from a public building.

Section 4106(a) corresponds to 11 Del.C § 1323, with several minor changes. First, the language "alone or with other persons" from § 1323 has not been included. Because Subsection (a) already prohibits the obstruction of public ways without lawful authorization, it should not matter whether the offense is committed by one or more persons. Second, in Subsection (a)(1), the base culpability level has been adjusted to "recklessly" and the "intentional[]" culpability of § 1323 has not been included, although it is included in Subsection (a)(2). Because proposed Section 205 provides that a higher culpability proven will satisfy a lower culpability level, Section 4106 need only specify the lowest culpability that generates liability. Third, the proposed

provision incorporates § 1324's prohibition on blocking ingress or egress by incorporating it into the definition of "public passage."

Section 4106(b) maintains 11 Del. C. § 1324's defense for lawful picketing.

Section 4106(c) sets the grading level of the offense as a Class D misdemeanor. As a violation of 11 Del. C. § 1323 is a violation and a violation of § 1324 is an unclassified misdemeanor, setting the baseline grading level at a Class D misdemeanor will ensure uniformity to the greatest extent possible, because a Class D misdemeanor is the lowest misdemeanor available under the proposed grading scheme.

Other Provisions Not Incorporated. 31 Del. C. § 2117, pertaining to seeing-eye dogs and disabled persons, has not been included in Section 4106. Among other prohibited conduct, the provision criminalizes the deprivation of disabled individuals from bringing guide animals into any establishment. The offense has not been included in this Section for two main reasons. First, § 2117 works in tandem with other provisions in current Title 31 and should remain in that Title. Second, the construction of proposed Section 4106 is already broad enough to encompass prohibited conduct against disabled individuals (*see* Section 4106(a)(1) "recklessly renders any public passage *unreasonably inconvenient* or hazardous to use") (emphasis added).

11 Del. C. § 1322 has also not been included in this Section because reckless endangerment is already prohibited by proposed Section 1204.

Comment on Section 4107. Desecration

Corresponding Current Provision(s): 11 Del. C. §§ 1331, 1340

Comment:

Generally. This provision criminalizes the desecration of any object of veneration by the public.

Relation to current Delaware law. Section 4107 directly corresponds to current 11 Del. C. §§ 1331 and 1340, maintaining the language of the offense definition of § 1331 and culpability requirement of intentionality from both current provisions. Current § 1340 does not require the offender to "know" her actions "will outrage the sensibilities of persons likely to observe or discover [her] actions." However, since both current offenses have the same grade (Class A misdemeanor), and given the great similarities between them in other respects, it is appropriate to unify the offenses' elements. Furthermore, it is difficult to imagine a situation where a person intentionally desecrating a burial place could fail to know what effect her actions would have upon persons likely to observe the desecration.

The potential objects of desecration enumerated in Subsection (2) have been incorporated from 11 Del. C. §§ 1331 and 1340, apart from the national flag. A blanket prohibition on desecration of the national flag raises constitutional concerns under the First Amendment.[13]

[13] If, for example, the desecration of the national flag is accompanied by a communicative aspect, then the criminalization of such desecration violates the First Amendment. In *Texas v. Johnson*, 491 U.S. 397 (1989), the United States Supreme Court ruled that a Texas statute criminalizing the desecration of the national flag violated the First Amendment when a defendant burned the flag during a political demonstration in protest of certain policies of the Reagan administration. But, if there is no expressive aspect to the desecration of the flag (if perhaps the flag was desecrated when no one was present), then such desecration may properly be criminalized.

Comment on Section 4108. Definitions

Corresponding Current Provision(s): 11 Del. C. §§ 1320, 1321, 1324, 1337

Comment:

Generally. This Section provides definitions of key terms used in this Chapter.

Relation to current Delaware law. Section 4108(a) introduces a new definition of "loiter[ing]" based on the offense language in 11 Del. C. §§ 1320 and 1321. The term is not specifically defined in current Delaware law.

Section 4108(b) broadens the scope of "public passage" by incorporating 11 Del. C. § 1324, which prohibits knowingly obstructing "ingress to or egress from public buildings." Because Section 4106(a)(1) already criminalizes the reckless obstruction of any public passage, the ingress to or egress from a public building has simply been added to the definition of "public passage," such that these obstruction offenses can be easily consolidated. The proposed definition also incorporates 11 Del. C. § 1301(1)d.'s prohibition on obstructing vehicular or pedestrian traffic.

Section 4108(c) incorporates the definition of "public place" found in 11 Del. C. § 1337(b). Because the definition applies to areas where "the public or a substantial group of persons has access," it is consistent with the defined term "place open to public view" in Section 4208.

CHAPTER 4200. PUBLIC INDECENCY AND OBSCENITY OFFENSES

Section 4201. Public Indecency
Section 4202. Prostitution; Patronizing a Prostitute
Section 4203. Promoting or Permitting Prostitution
Section 4204. Distribution and Possession of Obscene Material and Child Pornography
Section 4205. Unauthorized Combat Event
Section 4206. Abuse of Human Remains or Associated Funerary Objects
Section 4207. Cruelty to Animals
Section 4208. Definitions

Comment on Section 4201. Public Indecency

Corresponding Current Provision(s): 11 Del. C. §§ 764, 765, 778A, 1341

Comment:

Generally. This provision defines an offense prohibiting sexual intercourse, sexual conduct, or other indecent exposures of the body in places open to public view.

Relation to current Delaware law. Section 4201(a) combines 11 Del. C. §§ 765 and 1341. The language of Subsection (a) has been generalized to cover the slightly different behavior described in each offense. The current offense definition in § 1341 (lewdness) is problematic because: (a) the current code fails to define "lewd"; and (b) it focuses primarily on the actual location where the act occurs—"public place", defined poorly in § 1337, which says the definition applies only to disorderly conduct offenses. Both offenses are drawn too narrowly, because they each require the offender's *knowledge* that his likely observers would be "affronted or alarmed." The subjectivity of the offender's mental state in the current formulation seems unnecessarily difficult to prove. Instead, Section 4201(a) reformulates the offense according to objective behavior, visibility of that behavior, and lack of prior consent/knowledge of likely observers. Note that the term "lewd", in both the title and definition of the offense, has been abandoned to avoid ambiguity.

Section 4201(b) corresponds to 11 Del. C. § 764, but specifies that defecation also satisfies the offense definition. Note that the current offense is most often used to prosecute public urination; but, a person could urinate or defecate in public without actually exposing his or her genitals to anyone. Such conduct constitutes an offense under this Section.

Section 4201(c) adds an exception to make clear that exposure of a breast for the purpose of feeding an infant child is not indecent.

Section 4201(d) maintains the grades of §§ 764, 765, which aggravates indecent exposure where the observer is a person less than 16 years of age, and 1341. Subsection (d)(1)(A) incorporates the grades of § 778A(2) and (4)b., where the victim is a child under whom the offender stands in a position of trust, authority, or supervision.

Comment on Section 4202. Prostitution; Patronizing a Prostitute

Corresponding Current Provision(s): 11 Del. C. §§ 1342, 1343, 1345, 1356(4); *see also* 1344

Comment:

Generally. This provision criminalizes the act of exchanging sexual conduct or intercourse for anything of value.

Relation to current Delaware law. Section 4202(a) corresponds to 11 Del. C. §§ 1342(a)(1) and 1343(a). The offense definitions for prostitution and patronizing prostitutes are combined into a single, simpler definition that prohibits both offenses. Note that use of the term "offer" is not intended to punish an attempt to patronize a prostitute. Attempt liability is only punished through the inchoate offense in Section 701. Here, the "john" would need to engage in the sexual act paid for in order to commit the offense. The term "offer" is only used so that the single offense definition can accommodate both sides of a prostitution transaction. Additionally, the definition for offer and acceptance in Subsection (e) makes it clear that the actors involved in the sexual conduct can be convicted even if money does not pass directly into or out of their hands, *i.e.*, it accounts for the involvement of pimps, third-party brokers, or escort agencies. Additionally, by adding the language "he or she" to the offense definition, the current § 1344 is made unnecessary, as the sex of the actors is irrelevant. Finally, the term "sexual contact" has been substituted for "sexual conduct" to clarify that there must be some form of touch between the parties for prostitution to differ from other sexualized conduct, such as exotic dance.

Section 4202(b) grades the offense, which depends in part on the status of the prostitute involved. Subsection (b)(1) incorporates the patronage aspect of the current offense for human trafficking and sexual servitude, 11 Del. C. § 787(b)(4). If the patron knows the prostitute is a victim of sexual servitude, the grade for the patron's offense is raised dramatically to a Class 6 felony, following current law. The grade is raised to a Class 5 felony if the trafficking victim is less than 18 years of age. Note that the issue of the victim's ineffective consent found in § 787(b)(4) need not be addressed here because it is already addressed generally in Section 208 of the Proposed Code. In all other cases, Subsection (b)(2) maintains the grade for the current prostitution offense. Yet, currently, patronizing a prostitute is only classified as "a misdemeanor" in § 1343(b). Because the two offenses are treated identically in all other respects, patronage is also treated as a Class B misdemeanor in Section 4202. §§ 1342(b)(1) and 1343(e)(1) increase the grade of the offense and impose a mandatory fine when the offense is committed in a protected zone. Section 4202 does not include these provisions for two reasons. First, all minimum penalty provisions in the Proposed Code are set forth in Section 802. Second, the grade adjustment to a Class A misdemeanor goes into effect any time the offense is committed within 1,000 feet of a *residence*, among other places. In an area of average population density, this provision is likely to increase the grade of the offense in every instance. This creates a false distinction, whereby the true grade of the offense is effectively heightened without considering whether it is deserved. It seems unlikely that the General Assembly intended this consequence, and so that provision has not been retained in Section 4202.

Section 4202(c) incorporates the affirmative defense for prostituted victims of human trafficking found in 11 Del. C. § 787(h). Note that although Section 4202 combines the offenses of prostitution and patronizing a prostitute, the defense is only intended to apply—and only logically applies—to trafficked prostitutes, not their patrons.

Section 4202(d) incorporates § 1345, which requires any person convicted under Section 4202 to be tested for sexually transmitted diseases.

Seizure and Forfeiture of Vehicles. The vehicle seizure provisions found in 11 Del. C. § 1343(c)–(d) have not been incorporated into Section 4202. The current provision provides that vehicles of patrons of prostitutes may be seized by law enforcement. Delaware has a general asset seizure and forfeiture provision dealing with instruments of crime that makes reference to § 1343. It is only one of two non-felonies in Title 11 subject to forfeiture. Singling out lesser misdemeanors for additional punishment, absent specific justification, creates inconsistencies that damage the law's moral credibility. For that reason, the forfeiture provisions relating to patronizing a prostitute have not been included.

Comment on Section 4203. Promoting or Permitting Prostitution

Corresponding Current Provision(s): 11 Del. C. §§ 1351, 1352, 1353, 1355, 1356; *see also* 787, 1354

Comment:

Generally. This provision defines an offense to create liability for persons who promote prostitution, or who permit prostitution to take place on their property.

Relation to current Delaware law. Section 4203(a) combines the offense definitions of 11 Del. C. §§ 1351, 1352, 1353, and 1355, and converts the definitions upon which those offenses rely, § 1356(a)–(b), into actual offense definition language. Although this is a substantial organizational change, the substance of the current law is intact. Subsection (a)(1) is broad enough to capture causing or aiding someone to engage in prostitution, though without the problem of having to prove causation—a problem under § 1356(1). It is also broad enough to cover soliciting patrons for prostitution, and a host of other activities. Yet, note that inchoate liability for solicitation and conspiracy, as well as accomplice liability, help expand the reach of this offense. Subsection (a)(2) covers any situation where a person provides premises for prostitution purposes, including the offense of "permitting prostitution" in § 1355. No special grading provisions have been made for that offense, because it is not meaningfully different from "advancing prostitution" under § 1356(1) and is graded much more leniently than promoting prostitution in the third degree. A person who has control of premises and knows they are being used for prostitution, yet fails to abate the activity, has provided premises for prostitution. Subsection (a)(3) more simply articulates the meaning of "profit from prostitution" in § 1356(2).

Section 4203(b) retains the clarifications in the current § 1356(1)–(2) that prostitutes and patrons of prostitution are not the intended targets of the offense under Section 4203. Rather, they ought to be prosecuted under Section 4202 alone.

Section 4203(c)(3)–(4) retains the grading scheme of the offenses consolidated in Section 4203(a). As previously mentioned, the offense definitions of §§ 1351–53 have been converted into grading provisions, because they all rely upon the definitions of "advance prostitution" and "profit from prostitution" in § 1356(1)–(2) that provide the functional offense definition for all three statutes. Yet, some of the consolidated activities and grading provisions overlap with provisions related to human trafficking in 11 Del. C. § 787. Promoting prostitution under compulsion by force or intimidation is covered in more detail in Section 1402(a)(2), so it is not

included here. Additionally, § 787(b) grades prostitution of minors much more harshly than the consolidated offenses for promoting prostitution. Subsections (c)(1)–(2) reflect those grades.

Evidentiary Provision Not Retained. The evidentiary restrictions in 11 Del. C. § 1354 (promoting prostitution; attempt to promote prostitution; corroboration) have not been included. The provision overrides a key role of the fact finder—weighing the credibility of witnesses and testimony. The current law reflects a value judgment that prostitutes are always complicit in the crimes of those who profit from their prostitution, rather than acknowledging that prostitutes could be victims of such crimes. 11 Del. C. § 1354 would not even permit a pimp to be convicted solely by the testimony of *minors* who have been prostituted by the defendant. It is better to let the court system to do its job, rather than make credibility determinations before the fact in substantive legislation.

Comment on Section 4204. Dissemination and Possession of Obscene Material and Child Pornography

Corresponding Current Provision(s): 11 Del. C. §§ 1108, 1109, 1111, 1361, 1362, 1363; *see also* 1110, 1365, 1366.

Comment:

Generally. This provision covers a wide range of conduct related to the dissemination and possession of obscene material, including child pornography.

Relation to current Delaware law. Section 4204 merges several offenses dealing with obscenity, creation of and dealing in child pornography, exploitation of children, and possession of child pornography. The core offenses—possessing and disseminating either obscenity or child pornography—are each separately defined in Subsection (a), and organized in order of decreasing seriousness. Subsection (a)(1) prohibits all forms of creation or distribution of child pornography, and along with the definition of "child pornography" in Subsection (f)(2) is intended to capture all the behavior currently prohibited by 11 Del. C. § 1108–09. Generalizing that behavior will ensure that no conduct deserving of punishment will fail to be punished because of its non-inclusion in a list of specific acts. The current offenses also punish conduct that is already punished through accomplice liability and inchoate offenses, which will further expand the reach of Subsection (a)(1). The territorial applicability provision in § 1109(4) has not been preserved in Section 4204 because the general provision on territorial applicability and jurisdiction in Section 105 is broad enough to cover digital transmissions through the state. Subsection (a)(1) does not specify that the offense can be committed through digital means, as the phrase "otherwise makes available" is broad enough to capture any means of distribution. The remaining offenses in Subsection (a) are all broad enough to make that specific language unnecessary. Also, the rebuttable presumption provision in § 1109(3) has not been retained because possession of child pornography is already punishable as a felony, and ownership is not a necessary element of Section 4204. Finally, note that although Subsection (a)(1)(B) is intentionally constructed broadly, it should not include children victimized through the creation of child pornography.

Subsection 4204(a)(2) directly corresponds to the provision punishing possession of child pornography in § 1111. Subsection (a)(3) combines and generalizes the various aspects of the

current obscenity offense in § 1361(a)(1)–(3), while Subsection (a)(4) corresponds to § 1361(a)(4).

Note that the culpability requirement "knowingly" is used throughout most of Subsection (a). "Knowingly" only applies to the offender's conduct, however. As is the case under current Delaware law, no culpability requirement is specified as to the material in question being pornographic or obscene. Under Section 205, the requirement of recklessness should be read into that circumstance element. An offender under Subsection (a)(2), then, would need only be reckless as whether the material he possesses depicts a child less than 16 years of age to be found guilty of the offense.

Section 4204(b) incorporates and maintains all the grades of the offenses that currently exist. Yet, the "subsequent conviction" grade increases in § 1110 have not been included here, because all grade adjustments for repeat offenders are treated together in Section 804. Note that Subsection (b)(1)(A)–(B) split the offense under Subsection (a)(1) into two different grades, depending on whether the offense is committed for gain. Current law does not make this distinction. The legislation authorizing this Proposed Code mandates that "disproportionate" statutes be identified and rectified. The proportionality of an offense's authorized punishment is directly tied to the grade assigned to that offense. An offense's grade could be either disproportionately high *or* low. The nonpartisan consultative group supervising the drafting process for this Proposed Code has scrutinized the relative grading of all offenses, and has decided whether this offense is committed for gain is a significant factor that affects the offender's blameworthiness, and therefore that the offense's grade must account for it to avoid disproportional punishment. Note also that Subsection (b)(2)(A) sets the grade of possession with intent to commercially disseminate child pornography at roughly one grade lower than it is under current law (a Class B felony). This is because "possession with intent" is a specially codified form of attempt liability. Its centrality to certain areas of modern law enforcement makes it indispensible to this Section. But the grade of possession with intent has been set at one grade lower than the offense would be if completed. This maintains consistency with the way attempts are graded for all other offenses is the Proposed Code. *See* proposed Section 707 and corresponding Commentary.

Section 4204(b)(5) proposes a new, much lower grade with no corresponding provision in current law. The new grade is intended to limit liability in cases of teenage "sexting," an increasingly common activity that technically satisfies the definition of child pornography but was not contemplated by General Assembly when creating the current child pornography offenses. Internet-enabled devices with cameras have made it common for young people in dating relationships to take and send nude and sexually explicit images of each other. If at least one of the parties involved is less than 16 years of age, one of the parties could be liable for a serious felony under Section 4204. The general consent defense in Section 208 would arguably cover these situations; but, Section 208(c)(2) contains an exception for "ineffective consent" that could also apply due to the young age of the parties involved. Therefore, Subsection (b)(5) is proposed to ensure that young people in relationships sending explicit images consensually will not be exposed to serious felony liability.

Note that Section 4204(b)(5) is drawn narrowly to address a very specific scenario. First, the parties must both be 18 years of age or less (or 19 years of age and enrolled in high school), denying a defense to anyone older than a high school senior. Second, the parties must be no more than 3 years apart in age, preventing application of the lower grade in materially more blameworthy situations (e.g., an 18-year-old high school senior trading nude pictures with a 12-

year-old). Third, only images of the parties themselves are covered. And finally, if the defendant is the sender of the depiction, the sender must reasonably believe that the recipient would have consented to receiving the image if he or she had been asked in advance. This requirement is intended to cover dating relationships, or relationships similar enough that the sender could reasonably believe that consent would not be withheld. The requirement is written in this way (rather than requiring a dating relationship outright) so that courts will not have to decide what qualifies as "dating." Images possessed by a recipient in this relationship are also covered by the lower grade.

This formulation does not protect a person from circulating images of a partner to other people, or circulating images of himself or herself to strangers or mere acquaintances. But, note that the provisions pertaining to the treatment of minors – addressed outside of the Proposed Code, in Title 10 – might be applicable. Additionally, Section 4204(b)(5)(E) explicitly provides that if a party to consensual "sexting" chooses to distribute a depiction of the other person without that person's consent, liability would not come under Section 4204, but instead under Section 4305 for unlawful dissemination of personal pornography. Given that the parties involved are of the same, young peer group, the offense in that case is one of privacy, rather than of the social ill contemplated by Section 4204.

Section 4204(c) directly corresponds to the penalty for businesses in § 1361(b). Although that penalty currently only appears to apply to conduct involving adults, and not children, it seems appropriate that the penalty should apply to both.

Section 4204(d) directly corresponds to the presumption in § 1363.

Section 4204(e)(1) directly corresponds to the current § 1362; but, language has been added to make clear that persons under 18 are excluded, to maintain consistency with Subsection (b)(3)(A). Subsection (e)(2) is a proposed defense for actors involved in the creation of obscenity or child pornography who are victims of human trafficking, including sexual servitude, under Section 1402. 11 Del. C. § 787(h) contains such a defense, but applies it only to prostitution and loitering. On the other hand, § 787(j) provides expungement and pardon procedures for victims of human trafficking who are convicted of prostitution, loitering, *or obscenity*. Because all three offenses have similar potential to stem from human trafficking, the defense ought to be extended to Section 4204.

Section 4204(e)(3) proposes an explicit defense for victims of child pornography creation. Subsection (a)(1)(B), on its face, could be interpreted to include child-victims who "participate[] in the creation of child pornography." But, this result is clearly not what the General Assembly intended when it enacted the child pornography offenses on which Section 4204(a)–(b) is based. Subsection (e)(3) eliminates any possibility of the offense being applied to child-victims.

Related Provisions Concerning Minors Not Retained. Current §§ 1361(a)(5), 1365 (obscene literature harmful to minors), and 1366 (outdoor motion picture theaters) have not been retained in the proposed Chapter 4200, for three reasons. First, these provisions are graded lower than Section 4204—Class A misdemeanors—even though prohibiting obscene material from entering the hands of minors is more constitutionally defensible than a general obscenity offense. Second, these provisions have almost never been used as the basis of prosecution. 11 Del. C. § 1365 contains numerous procedural steps the Attorney General must go through to declare a particular material to be "harmful to minors." Only after a potential defendant has been put on notice regarding the Attorney General's finding, and violates an injunction prohibiting the material, can a defendant be prosecuted, let alone convicted; all of which is predicate to a Class

A misdemeanor conviction. Additionally, § 1366's lack of use is evidenced by the fact that it has not been updated since the Motion Picture Association of America created "PG-13" and "NC-17" ratings. Third, the definition of what is "harmful to minors," though intended to be something short of obscenity, is not meaningfully distinct from obscenity such that a separate set of offenses is justified. In addition, § 1361(d) have not been retained. Insofar as this provision refers to § 1361(a)(5), it is unnecessary, as § 1361(a)(5) itself has not been retained.The remainder of § 1361(d) imposes strict liability as to knowledge that the age of the person to whom pornographic materials are disseminated in under 18. Strict liability as to age may be justified in certain curcumstances, and provided that genuine mistakes as to age are unlikely to occur. For instance, the Proposed Code imposes strict liability as to the age of victims younger than 14 years in Section 1301 [Rape and Sexual Assault]. However, general principles of criminal liability ordinarily eschew the use of strict liability, and neither the nature of the predicate offense nor the 18 years of age threshold in § 1361(d), justifes deviation from these principles.

Comment on Section 4205. Unauthorized Combat Event

Corresponding Current Provision(s): 11 Del. C. §§ 1367, 1368

Comment:

Generally. This provision punishes participation in or promotion of unlawful boxing matches and other forms of combat events and entertainment.

Relation to current Delaware law. Section 4205(a) combines two nearly identical offenses. 11 Del. C. §§ 1367 and 1368 are the same in all respects, except that one prohibits participation in unauthorized combat, and the other deals with promotion, advertisement, and facilitation. Both are Class A misdemeanors, so consolidation makes sense.

Note that a "knowing" culpability requirement has been created for Section 4205. The current offenses set no culpability, but only require that the combat event itself violated Chapter 1 of Title 28. It seems appropriate to punish offenders under Section 4205 only if they know the combat event is unauthorized, but recklessness could be substituted instead.

Comment on Section 4206. Abuse of Human Remains or Associate Funerary Objects

Corresponding Current Provision(s): 11 Del. C. §§ 1332, 1333; 7 Del. C. §§ 5407, 5409

Comment:

Generally. This provision creates an offense covering persons to treat human remains and objects associated with interment in a variety of objectionable ways. The offense covers the more commonly codified offense for abuse of a corpse, which punishes sexual indecency, physical abuse, mutilation, gross neglect, and other outrageous treatment of corpses. Yet, the offense also prohibits dealing in human remains that are of archaeological interest, as well as the exhibition of human remains. The exception for treatment authorized by law excludes from the offense all the lawful acts that may be done to human remains, such as embalming, autopsy, scientific research, medical examination, normal operations of cemeteries, and authorized archaeological activities.

Relation to current Delaware law. Section 4206(a) combines the offense definitions of the current 11 Del. C. §§ 1332 (abuse of corpse) and 1333 (trading in human remains & associated funerary objects), as well as 7 Del. C. § 5407 (prohibitions regarding excavated archaeological remains). Subsection (a)(1) is the common "abuse of corpse" offense; but, the current §1332 only requires that a "reasonable person" know that the act is outrageous, which makes the culpability requirement something close to negligence. Negligence alone would be too slight to support a Class A misdemeanor, so recklessness has been substituted. To accommodate all three offenses, the more inclusive term "human remains" is borrowed from Title 7, rather than the undefined term "corpse" used in § 1332. This allows the exhibition of human remains in 7 Del. C. § 5407(3) and the acquisition and sale of human remains in § 1333(b) to be captured under Subsection (a)(1). This alters the grade of those consolidated offenses, which vary from a Class F felony to a Class B misdemeanor.

Given how similar they are, however, the average grade of Class A misdemeanor has been used in Subsection (b)(1). Otherwise, the grades of the current offenses have been kept intact. Note that the enumerated exceptions for lawful activities have been substituted with the phrase "except as authorized by law" in Subsection (a). Finally, human remains removed from "marked" burials have been added to "unmarked" burials to support liability for the sale of human remains under Subsection (a)(2)(B). The current regulatory offense in 7 Del. C. § 5407 only deals with remains from unmarked burials, but it is equally blameworthy for a person to sell remains taken from beneath a grave marker. Failure to criminalize the latter activity makes felony-level punishment for the former activity seem arbitrary, undermining the moral credibility of the law.

Section 4206(b) imports the remaining grades from the current offenses.

Comment on Section 4207. Cruelty to Animals

Corresponding Current Provision(s): 11 Del. C. §§ 1325, 1326; *see* 1325A, 1327

Comment:

Generally. This provision punishes the unlawful killing of another's animal and the cruel mistreatment or neglect of animal, except in cases where the person followed accepted veterinary practices or carried on the activities for lawful scientific research.

Relation to current Delaware law. Section 4207 endeavors to combine two sprawling, yet in some ways similar, animal abuse statutes. It retains all salient differences in grading and penalties between the various old offenses, but organizes them together with careful headings. The most important substantive difference is the simplification of the offense definition language, despite there being four ways to commit animal cruelty.

Note that the animal rescue provision from 11 Del. C. § 1325(b)(6) is maintained as a special justification defense in Section 4207(e). It is written in purely objective terms to keep it consistent with the approach taken for all general justification defenses in Chapter 300. For that reason, Section 4207(e)(2) provides that the general excuse defense for a mistake as to a justification in proposed Section 410 also applies to Subsection (e)(1).

11 Del.C § 1326(c) prohibits gambling on animal fighting. That Subsection will be addressed in Chapter 4500 [Offenses Involving Gambling].

Many definitions currently found in § 1325 have not been included because the offense definition here is broad enough to make use of those terms unnecessary. Furthermore, many of those terms are redundant, filled with examples rather than definitions, or have readily apparent meanings.

Maintaining a Dangerous Animal. 11 Del. C. § 1327 has not been included in Chapter 4200. Although it involves animals, and deals to a certain extent with animals trained to fight, it more properly belongs with offenses dealing with danger or injury to person or property. If the animal's owner has the proper culpability as to causation, the owner could be guilty of homicide, endangerment, or property damage offenses, because animals count as property. Additionally, exposing another's animal to one's own dangerous animal could be prosecuted as animal cruelty under Section 4207 without the need to specifically incorporate § 1327.

Unlawful Trade in Dog or Cat By-Products. 11 Del. C. § 1325A has not been included in Chapter 4200. That provision punishes selling or bartering of fur, flesh, or by-products of domestic dogs and cats. 11 Del. C. § 1325A has nothing to do with the treatment of cats or dogs during their lives, so it does not fit comfortably within Section 4207. Rather, the offense is a prohibition on certain kinds of commercial activities, thereby performing a purely regulatory function. If it must be retained at all, § 1325A ought to be moved out of the criminal code altogether, and into a regulatory title dealing with trade.

Comment on Section 4208. Definitions

Corresponding Current Provision(s): 11 Del. C. §§ 1325, 1333, 1356, 1364, 1367, 1368; 7 Del. C. § 5402

Comment:

Generally. This Section provides definitions of key terms used in this Chapter.

Relation to current Delaware law. Section 4208(a) defines "child pornography," a term the current code does not specifically define. The phrase "person less than 16 years of age" has been added because the current child pornography offenses fail to define the term "child." The term "prohibited sexual act," used throughout the current offenses dealing with child pornography, has been replaced with "sexual conduct" for simplicity and completeness. This way, no acts deserving of punishment will be overlooked by use of a list. Additionally, using the phrase "any visual depiction" captures any form of pornography involving children, including live performances.

The prohibition against child pornography is based, in part, on how the pornography is made, rather than what the product purports to depict. For instance, the United States Supreme Court held that a federal statute that banned child pornography produced through "the use of youthful-looking adults or computer-imaging technology," *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 234 (2002)," instead of using real children, was overbroad as it could necessarily cover expressions protected by the First Amendment. Thus, the term "child pornography" should be interpreted to involve pornography involving real children, whether they are actually engaged in sexual conduct or are merely play-acting. Therefore, the term "simulate" in Subsection (a)(1) should be interpreted to refer to pretend sexual conduct performed by real children—not, for example, computer-generated depictions of "children" engaged in sexual conduct.

Finally, the phrase "visual depiction *or depictions* of a person *or persons*" is intended to avoid the possibility of a defendant being charged with multiple counts of child pornography offenses based upon every photograph or video involved, or every child depicted in an offender's collection. Yet, the term should also be interpreted flexibly to allow multiple charges of the offense where the total amount of pornography involved can and should be logically divided—for example, where a person oversees different sessions of child pornography creation, or where a person possesses multiple collections of child pornography over a period of time.

Section 4208(b) defines "combat event" so as to make the offense definition as simple as possible. The offense definitions in 11 Del. C. §§ 1367 and 1368 include this language, so it is not a change from current law.

Section 4208(c) provides a definition of "commercial animals." The defined term is newly created, but its definition corresponds directly to the language contained in the 11 Del. C. § 1325(c) and (d) offense definitions.

Section 4208(d)'s definition of "cruel" is taken verbatim from 11 Del. C. § 1325(a)(3).

Section 4208(e) provides a definition of "funerary object associated with interment" that corresponds to the definition currently found in 11 Del. C. § 1333(a)(1).

Section 4208(f)'s definition of "human remains" is taken verbatim from 7 Del. C. § 5402.

Section 4208(g) defines when any material or performance is "obscene." The definition directly corresponds to the definition currently found in to 11 Del. C. § 1364.

Section 4208(h) creates a definition of "place open to public view" to clarify the new formulation of the public indecency offense. Note that because the definition focuses on the reasonable expectations of members of the public, the places included in the definition will vary depending on the particular conduct at issue in a particular case. For instance, at a protest supporting certain causes, one might reasonably expect to see nudity, but not intercourse. This approach allows the court to make a standards-based evaluation of propriety to ensure just outcomes in the greatest number of cases.

Section 4208(i) provides a definition of "sexual conduct" that corresponds to the definition currently found in 11 Del. C. § 1356(4). The binary definition of "sexual conduct," however, has been replaced with the more general "any person." This recognizes situations where two or more persons may engage in sexual conduct for the sexual gratification of a nonparticipant.

Section 4208(j) provides a definition of "unmarked burial" that corresponds to the definition currently found in 7 Del. C. § 5402.

CHAPTER 4300. INVASION OF PRIVACY OFFENSES

Section 4301. Unlawful Eavesdropping or Surveillance
Section 4302. Voyeurism
Section 4303. Interception of Private Information
Section 4304. Unlawful Use of Information
Section 4305. Unlawful Dissemination of Personal Pornography
Section 4306. Unlawful Access to Information
Section 4307. Definitions

Comment on Section 4301. Unlawful Eavesdropping or Surveillance

Corresponding Current Provision(s): 11 Del. C. §§ 1335, 1337

Comment:

Generally. This provision defines the offense of unlawful eavesdropping or surveillance, prohibiting improper intrusions made for the purpose of hearing or seeing things within private places. Section 4301 is similar to proposed Section 4303, but covers improper intrusions into private physical spaces rather than improper interceptions of private communications. Where conduct constitutes a violation of both Section 4301 and 4303—that is, if it included physical intrusion and interception of private communication—both offenses could be charged.

Relation to current Delaware law. Section 4301(a) corresponds to the current invasion of privacy provisions found in 11 Del. C. §§ 1335 and 1337. The purpose and function of §§ 1335(a)(1), (a)(2), (a)(3), and (a)(8) are maintained here, but are simplified into a single Subsection. Section 4301(a)(1) directly incorporates 11 Del. C. § 1335(a)(1) and Section 4301(a)(3) directly incorporates 11 Del. C. § 1335(a)(3), with no substantive differences between the proposed and current provisions.

Section 4301(a)(2) directly corresponds to 11 Del. C. § 1335(a)(2), with one minor addition. The current provision prohibits only *installing* a surveillance device inside a private place. The proposed provision also prohibits *using* such a device. Note that Subsection (a)(2) does not specify what kinds of events or images could be observed or recorded, so the offense definition is broad enough to include body heat scans, for example.

Section 4301(a)(4) incorporates 11 Del. C. § 1335(a)(8), with two minor simplifications. First, the current provision contains an exception noting that the provision shall not apply "to the lawful use of an electronic tracking device by a law enforcement officer, nor shall it apply to a parent or legal guardian who installs such a device for the purpose of tracking the location of a minor child thereof." The proposed provision deletes that specification not to delete the exception from the law, but rather for simplicity because the exception need not be explicitly stated. The beginning of Section 4301(a) includes the phrase "except as authorized by law," which includes the right of law enforcement officers to use electronic tracking devices pursuant to valid warrants. Moreover, conduct involving a parent's tracking of a motor vehicle when (1) the parent is the registered owner of the motor vehicle, and (2) the vehicle is driven by the parent's minor child, is already exempted by the offense definition. Second, the proposed provision removes the reference to "electronic or mechanical" tracking devices, which are included in the general term "location tracking device."

Section 4301(a) as a whole differs from 11 Del. C. § 1335 in that it establishes "knowingly" as the culpability requirement applying to all offenses in the Section. The only current provision that contains a culpability requirement is 11 Del. C. § 1335(a)(8), which uses "knowingly." The proposed provision applies the "knowingly" requirement to each offense in Section 4301(a). The offense conduct in Subsections (a)(1)–(4) are so similar to each other that "knowingly" seems to be the minimal level of culpability for the conduct covered by Section 4301(a). Note also that "consent" in Subsection (a) is intended to require only single party consent. Current § 1335 requires that certain privacy offenses be committed "without the consent of the person or persons entitled to privacy there," but this requirement places an irrationally heavy burden on the defendant to avoid liability. The defendant could not reasonably be expected to know the identities of every person entitled to privacy in a given location. Receiving consent from one person with authority to give it should be sufficient. This would not, however, allow one authorized person's consent to override another authorized person's withheld consent, as long as the defendant knew about the conflict.

Section 4301(b) maintains the grade from 11 Del. C. § 1335(c).

Comment on Section 4302. Voyeurism

Corresponding Current Provision(s): 11 Del. C. § 1335; *see also* § 820

Comment:

Generally. This provision defines the offense of voyeurism, which prohibits photographing, videotaping, or otherwise recording the image of another person in the process of getting dressed or undressed, under or through the person's clothes, or while the other person is nude, partially nude, or engaging in sexual conduct.

Relation to current Delaware law. Section 4302(a) corresponds with 11 Del. C. § 1335(a)(6), (a)(7), and (a)(9), but streamlines the current provisions. Section 4302(a)(1) corresponds with 11 Del. C. § 1335(a)(6), but with two minor differences. 11 Del. C. § 1335(a)(6) includes an illustrative list of places where persons normally disrobe, and notes that the provision does not apply to acts done by a parent or guardian inside of that person's dwelling when the "victim" is the parent's child under 18 and the acts were not intended for sexual gratification. Section 4302(a)(1) removes the illustrative list. Yet, the exemption for parents is retained in simpler form in Subsection (b).

Section 4302(a)(2) corresponds to 11 Del. C. § 1335(a)(7), but with one minor difference. The current provision specifies that the provision only applies when the recording of the image of another person under or through the person's clothes is done "for the purpose of viewing the body of or the undergarments worn by that other person." The proposed provision removes that clause because recording the image of another person under or though that person's clothes should be criminally punishable whether the recording was done to view the person's body or undergarments, or for another purpose, as long as it was done knowingly and without the subject's consent.

Section 4302(a)(3) corresponds to 11 Del. C. § 1335(a)(9), but with two differences. First, the current provision defines a number of terms, such as "nude" and "sexual conduct." The definitions are not reproduced in the proposed provision because "nude" needs no definition in the context of "nude, partially nude, or engaging in sexual conduct," and "sexual conduct" is

already defined in Chapter 1300 of the Proposed Code. Second, the proposed provision eliminates for clarity a long list of aggravating factors and a large number of exceptions. Those provisions are no long necessary either because of the way Section 4302 is graded, as discussed below; or because they amount to situations where consent is lacking, in which case the offense definition covers those situations already.

Section 4302(c) corresponds to the grade provision in 11 Del. C. § 1335(c). The provisions corresponding with Section 4302(a)(1) and (a)(2) are currently Class G felonies, while the provision corresponding to Section 4302(a)(3) is currently a Class A misdemeanor, unless an aggravating circumstance applies, in which case it is a Class G felony. Section 4302(c) grades all the offenses as Class 8 felonies, which reflects the seriousness of the offenses. The offense under Section 4302(a)(3) is just as intrusive a violation of privacy as under Subsections (a)(1) and (a)(2), even without aggravating circumstances, and are treated as such by utilizing a single grade for Section 4302.

Peeping Trespass. 11 Del. C. § 820, which prohibits trespassing with intent to peer or peep into a window or door of another, also relates to invasion of privacy. The offense is not reproduced here because it is already contained in proposed Section 2402, which deals with criminal trespass.

Comment on Section 4303. Interception of Private Information

Corresponding Current Provision(s): 11 Del. C. § 1335

Comment:

Generally. This provision defines the offense of interception of private information, prohibiting both the unlawful interception of any private electronic, written, or oral communication, as well as divulging the contents of unlawfully intercepted communications or communications intercepted due to one's lawful employment with an agency or common carrier that transmits communications.

Relation to current Delaware law. Section 4303(a)(1) directly corresponds to 11 Del. C. § 1335(a)(4), but with two minor differences. First, the proposed offense replaces the current provision's "message by telephone, telegraph, letter, or other means of communicating privately, including private conversations" with "any private electronic, written, or oral communication." Second, the proposed offense includes the culpability requirement of "knowingly" because, like in Section 4301, it seems to be the minimal level of culpability needed for the conduct covered by this Subsection.

Section 4303(a)(2) directly corresponds to 11 Del. C. § 1335(a)(5), but with two minor differences. The proposed provision replaces the current provision's "existence or contents" of any communication intercepted under Subsection (a)(1) with "contents." The term "existence" is unnecessary because it is included in the definition of "contents." Second, the proposed provision replaces the current provision's "any message by telegraph, letter, or other means of communicating privately" with "a communication intercepted under Subsection (a)(1)."

Section 4303(b) maintains the grading provision found in 11 Del. C. § 1335(c).

Comment on Section 4304. Unlawful Use of Information

Corresponding Current Provision(s): 11 Del. C. §§ 925, 935, 937, 938, 939, 1335; 31 Del. C. § 3912

Comment:

Generally. This provision defines the offense of unlawful use of information. The offense prohibits a person from disclosing or using information that the person knows was obtained in a manner prohibited by Section 4301, 4302, or 4303. The offense also prohibits the computer-related offenses of misuse of computer system information and misuse of electronic mail.

Relation to current Delaware law. Section 4304(a) is based upon the portion of 11 Del. C. § 1335(a)(9) that deals with reproduction and dissemination of photographs, videotapes, or other recordings of the image of another person who is nude, partially nude, or engaging in sexual conduct. Other prohibited conduct in § 1335(a) is not extended to disclosure. But, the same logic, that disclosing or using illegally obtained private information is a blameworthy invasion of privacy, applies equally well to the other offenses in Sections 4301–03. Breaking off the offense of unlawfully using information into its own Section, rather than combining it with the offense definitions in Sections 4301–03, improves clarity because the offense conduct in each case is fundamentally different.

11 Del. C. § 1335(a)(9) punishes a person when the person "knows or should have known" that the image was taken without consent, which reflects a culpability similar to negligence. The proposed Section 4304(a)(1) sets the culpability level at "knowing" because it seems to be the minimal level of culpability needed for the conduct covered by this Subsection. This new provision makes § 1335(a)(9)b. (which states that a person who has consented to the capture or possession of a visual depiction of herself when nude or engaging in sexual conduct retains a reasonable expectation of privacy with regard to dissemination of that depiction) unnecessary because Section 4304(a)(1) makes the use of information obtained in a manner prohibited by Section 4301, 4302, or 4303 explicitly unlawful. Section 4304(a)(2) is a catch-all provision that covers a number of regulatory offenses based on disclosure of confidential information, such as 16 Del. C. § 4798(r) (unauthorized disclosure of prescription drug monitoring information).

Section 4304(b) directly corresponds to 11 Del. C. § 935, but with two minor differences. First, the proposed provision replaces the current provision's culpability requirements of "intentionally" and "intentionally or recklessly" with "knowingly" for consistency with other offenses in this Chapter. Second, the proposed provision deletes the current provision's offense of knowingly receiving or retaining data obtained in violation of this Section. The current Delaware Code does not punish receipt of any other kind of information, only its use or disclosure, as is done in Subsection (a). As there is no reason to treat computer system information differently from other kinds of information, "receipt" would have to apply to all kinds of information and recordings if retained. "Receipt" was removed from Subsection (b), rather than added to Subsection (a), to prevent Section 4304 from capturing far more behavior than is contemplated by current law.

Section 4304(c)(1) corresponds to 11 Del. C. § 937, but with several differences. First, the current provision includes several sentences noting that the provision does not apply to email sent between people when the individual has requested the information or to email sent from an organization to its members where there is a preexisting business relationship. The current

provision also exempts internet service providers from liability for transmitting or attempting to block information covered by the provision. The proposed provision eliminates those exceptions because they are unnecessary given the language of the proposed provision requiring that distribution be unauthorized. Second, the proposed provision changes the current provision's culpability level from "intentionally or recklessly" to "knowingly," for the reasons given above. Third, the conduct elements of this offense have been broadened to include "distribut[ing] or caus[ing] to be distributed" any unsolicited bulk commercial emails; whereas current § 937(1) only criminalizes "intentionally or recklessly distribut[ing] any unsolicited bulk commercial electronic mail." This expansion of conduct is meant to capture increasingly common instances in sending unsolicited bulk commercial emails: where an individual would write a computer program that can create and send unsolicited commercial emails. The individual has not directly participated in the distribution of any unsolicited emails, but has directly caused them to be sent.

Section 4304(c)(2) corresponds with 11 Del. C. § 938, but with several differences. First, the current provision includes a sentence stating that all commercial email must include information telling the recipient how to unsubscribe. The proposed provision eliminates that language because it is in the nature of a commercial regulation, which should be located in a different title of the Delaware Code. Second, the proposed provision eliminates the language in § 938 specifying that conduct occurring outside of Delaware is sufficient to constitute an offense if the receiver was located in Delaware and the defendant was aware of circumstances which rendered the presence of such user in Delaware a reasonable probability. Section 105 of the Proposed Code contains a general provision for territorial applicability of offenses that explicitly covers electronic communications and would cover this conduct. Third, the proposed provision changes the current provision's culpability level from "intentionally, recklessly, or negligently" to "knowingly" for the reason stated above. Fourth, current § 938(a) requires that a defendant "fail[] to stop sending commercial electronic mail" after a legitimate request to do so. But, Subsection 4304(c)(2) alters the language to require that defendants "fail[] to prevent commercial electronic mail from being sent." Increasingly, commercial electronic mails are sent by third-party organizations who have access to the contact information of individuals; thus, the defendant organization that is subject to a §938(a) may not have necessarily "fail[ed] to stop sending commercial electronic mail[s]" because they have not sent any in the first place. 11 Del. C. § 938(a). Instead, formulating the offense to cover instances where a defendant "fails to prevent commercial electronic mail from being sent" is meant to capture situations, *inter alia*, where a defendant organization may have granted a third party access to consumer contact information, thereby facilitating the sending of commercial electronic mail; or where a third party acts as an agent of the organization and sends commercial electronic mail.

Section 4304(d)'s corresponding grading provision is found in 11 Del. C. § 939. The proposed provision alters the grading from its current state. Currently, the code grades the offenses covered by Section 4304 (except for Subsection (a), which is newly created) according to the value of the property or computer services affected. The grades range from a Class 6 felony to a Class A misdemeanor. The proposed provision eliminates the valuation method because, for the computer-related offenses in this Section, it is unlikely that any value will be lost. Section 4304(d) grades the offense under Subsection (a) as a Class A misdemeanor. But, a Class A misdemeanor is too high for the computer-specific offenses, where the nature of the data disclosed or affected is not necessarily as personally intrusive as information or recordings acquired under Subsection (a). Therefore, the offenses under Subsections (b) and (c) are graded

lower. Note, however, that if computer-related conduct violates any other provision of Chapter 4300, those offenses are available to provide higher punishment.

Video Privacy Protection and Adult Protective Service Records. Section 4304 does not include 11 Del. C. § 925. 11 Del. C. § 925 relates to video privacy protection and states that "A videotape distributor may not wrongfully disclose an individual or summary listing of any videotapes purchased or rented by a protected individual from the videotape distributor." This provision is overly specific and outdated in the internet era. Note however, that Section 4304(a)(2) does prohibit disclosure of information that is required by law to be kept confidential. Therefore, if the General Assembly will decide in the future to impose limitations on the disclosure of information by videotape distributors, internet providers, or other business entities, such disclosure would be prohibited by Subsection (a)(2).

Likewise, although 31 Del. C. § 3912 relates to unlawful use of information, Section 4304 does not carry it into the Proposed Code. 31 Del. C. § 3912 prohibits unlawfully disclosing Adult Protective Service records, but the offense seems to stem from a violation of one's duty of confidentiality, and not from an invasion of the privacy of the person to whom the record relates. The provision should remain in Title 31.

Comment on Section 4305. Unlawful Dissemination of Personal Pornography

Corresponding Current Provision(s): 11 Del. C. § 1335(a)(9) & (a)(9)b.

Comment:

Generally. This Section prohibits disseminating personal pornography depicting another person without that person's consent, even if the defendant obtained the pornography lawfully and with the victim's consent. It excludes commercially created depictions so that this offense cannot be used improperly to prosecute people who illegally share commercial pornography (that should instead be charged as the unlawful distribution of protected works under proposed Section 2108). Subsection (c)(1) provides that the defendant's appearance in the pornography is immaterial. This makes it so that the defendant's "consent" to sharing the pornography due to his or her participation in it does not override the victim's expectation of privacy.

Relation to current Delaware law. Section 4305 directly corresponds to 11 Del. C. § 1335(a)(9) and (a)(9)b. Yet, Section 4305 defines the offense more concretely than current law, which punishes situations where "the visual depiction was created or provided to the [defendant] under circumstances in which the person depicted has a reasonable expectation of privacy." Rather than rely upon this additional subjective standard, Section 4305 states the offense objectively, depending entirely upon whether or not the person depicted has consented to the distribution. Subsection (a)(1) explicitly carves out the most obvious situation where a person depicted pornographically would not have a reasonable expectation of privacy, which is depiction in commercial pornography. Other situations where a person would not have a reasonable expectation of privacy are situations where a person implicitly gives consent to distribution, making the additional "reasonable expectation" standard unnecessary. For example, a person who strips off his clothes and "streaks" nude at a professional baseball game has, under the circumstances, consented to both being filmed and having that film distributed because he knows that the game is being broadcast on national television.

Note that Section 4305 provides lesser punishment in some situations that would otherwise be subject to disproportionately high sentences. Note the interaction between Section 4305 and Section 4204(b)(5). Section 4204(b)(5) excludes school-age peers who send homemade pornography to each other—commonly known as "sexting"—from liability for serious child pornography offenses. Section 4204(b)(5) makes it a Class C misdemeanor for two people in a relationship to send such pornography to each other and possess it afterwards. But, if one of the parties then sends the pornography, depicting the other party, to other people, Section 4204(b)(5) requires that any liability be governed by Section 4305—a Class A misdemeanor—instead. This redirection keeps young people from being subjected to substantial felony liability for conduct that was not contemplated by the General Assembly when establishing child pornography offenses.

Comment on Section 4306. Unlawful Access to Information

Corresponding Current Provision(s): 11 Del. C. §§ 932, 939; 21 Del. C. 305(m); *see also* 11 Del. C. § 933

Comment:

Generally. This provision defines the offense of unlawful access to information. The offense prohibits a person from accessing or causing to be accessed information, electronic programs, or data when the person is not authorized to do so. The offense recognizes that even if a person does not steal or alter information, unauthorized access to information is, by itself, an invasion of privacy that the law ought to punish, much like a criminal trespass that results in no harm to the property.

Relation to current Delaware law. Section 4306(a) corresponds with 11 Del. C. § 932, with minor changes. The current provision frames the offense in terms of "the computer crime of unauthorized access to computer systems," which prohibits access to "any computer system without authorization." The proposed provision broadens the offense because the harm is the same whether someone unlawfully accesses information in a computer file or a paper file.

The proposed provision does not include 11 Del. C. § 933 (theft of computer services), which prohibits the accessing or use of "a computer system with the intent to obtain authorized computer services, computer software, or data." Theft of computer services and software are covered in Chapter 2100 of the Proposed Code, and data is included in Section 4306(a).

Section 4306(b)'s corresponding grading provision is found in 11 Del. C. § 939. As above in the Comment on Section 4304, the proposed provision alters the grading from its current use of valuation to determine the offense's grade. Section 4306(b) sets the grading level for Section 4306(a) at Class C misdemeanor in consideration of the relative blameworthiness between intruding into private spaces to gather information, disclosing such information, or merely accessing information to maintain consistency with the grades of other offenses in Chapter 4300.

Motor Vehicle Records. 21 Del. C. § 305(m) prohibits knowingly obtaining or disclosing personal information from a motor vehicle record for any use not permitted under Title 21 and making false representations to obtain any personal information from an individual's motor vehicle record. Although that provision relates to unlawful access to information, Section 4306 does not specifically address it because the offense is adequately captured by this Section.

Comment on Section 4307. Definitions

Corresponding Current Provision(s): 11 Del. C. §§ 931, 1337

Comment:

Generally. This Section provides definitions of key terms used in this Chapter.

Relation to current Delaware law. Section 4307(a) provides a definition of "commercial electronic mail" that is substantially similar to the definition currently found in 11 Del. C. § 931(2).

Section 4307(b) provides a definition of "computer system" that is substantially similar to the definition currently found in 11 Del. C. § 931(8). Throughout this Section, the proposed provisions do not define "computer" because the term's meaning is apparent. The definition of the term in 11 Del.C. § 931(3) is therefore unnecessary. The proposed provisions also eliminate clauses such as "and includes computer networks" and "including computer software" because the proposed provisions do not use the defined terms "computer network" or "computer software."

Section 4307(c) provides a definition of "contents of a communication." The definition is newly created; the current provisions do not contain a definition for this term.

Section 4307(d) provides a definition of "data" that is substantially similar to the definition currently found in 11 Del. C. § 931(9).

Section 4307(e) provides a definition of "electronic communication." The definition is newly created; the current provisions do not contain a definition for this term.

Section 4307(f) provides a definition of "electronic mail" that is substantially similar to the definition currently found in 11 Del. C. § 931(10).

Section 4307(g) provides a definition of "intercepts." The definition is newly created; the current provisions do not contain a definition for this term.

Section 4307(h) provides a definition of "originating address" or "originating account" that is substantially similar to the definition currently found in 11 Del. C. § 931(16). The proposed provision uses the term "sequence" instead of "string" and eliminates an example of an originating address, such as company@sender.com.

Section 4307(i) provides a definition of "private communication." The definition is newly created; the current provisions do not contain a definition for this term.

Section 4307(j) provides a definition of "private place" that corresponds to 11 Del. C. § 1337(a), but with three minor changes. First, the proposed definition replaces the current definition's "may reasonably expect to be safe . . ." with "would reasonably expect to be safe . . . ." Second, the proposed definition replaces the current definition's "casual or hostile intrusion or surveillance" with "unauthorized intrusion or surveillance," to both maintain consistency with the offense definition in Section 4301(a), and to avoid having to further define the terms "casual" and "hostile." Third, the proposed definition removes the phrase "'Private place' does not include an area to which the public or a substantial group thereof has access," because the accessibility of a location is already factored into whether the victim's expectation of privacy is reasonable. Additionally, it avoids the possibility of accidentally excluding areas accessible to the public where a person nevertheless has a reasonable expectation of privacy, such as fitting rooms, bathrooms, or locker rooms.

Section 4307(k) provides a definition of "receiving address" or "receiving account" that is substantially similar to the definition currently found in 11 Del. C. § 931(17). The proposed provision uses the term "sequence" instead of "string" and eliminates an example of a receiving address, such as person@receiver.com.

Section 4307(l) provides a definition of "trespass on real property." The definition is new, but it is merely a cross-reference that allows the offense definition to be read more cleanly. It does not change the meaning of current law.

CHAPTER 4400. OFFENSES AGAINST THE FAMILY

Section 4401. Incest
Section 4402. Bigamy
Section 4403. Child Abandonment
Section 4404. Interference with Custody
Section 4405. Assisting a Runaway
Section 4406. Contributing to the Delinquency of a Minor
Section 4407. Persistent Non-Support
Section 4408. Definitions

General Comment on Chapter 4400

Corresponding Current Provision(s): 11 Del. C. §§ 1004, 1102; *see also* 13 Del. C. § 728

Comment:

Generally. A number of current provisions in Title 11 and elsewhere that might have been included in Chapter 4400 have not, for various reasons. This Comment explains each of those decisions.

Advertising Marriage in Another State. 11 Del. C. § 1004 prohibits, within Delaware, the advertising of any information relative to the performance of marriage in another state. 11 Del. C. § 1004 is punished as a violation. This offense has not been retained in Chapter 4400 because of its obscurity, lack of use as a basis of prosecution—to the drafters' knowledge, it has never been used—and minor punishment.

Violation of Custody. 13 Del. C. § 728 applies only to parents, and punishes a parent who "has violated, interfered with, impaired or impeded the rights of a parent or a child with respect to the exercise of . . . custodial authority, residence, visitation or other contact with the child . . . ." 13 Del. C. § 728(b). The only time a sentence of imprisonment is authorized under § 728(b)(5), however, is when the offending parent "is found to be in contempt of prior orders of the Court." Because criminal contempt is a separate offense subject to its own punishment in proposed Chapter 3300, there is no need to create another criminal offense punishing violation of custody orders. 13 Del. C. § 728 should remain unchanged in Title 13.

Endangering the Welfare of a Child. 11 Del. C. § 1102 punishes, in a variety of ways, situations that endanger the physical, moral, or psychological well being of children. Functionally, it contains several separate offenses. Only a few portions of § 1102 are incorporated into Sections 4405 and 4406; the remainder of the offense is not retained in the Proposed Code.[14] 11 Del. C. § 1102(a)(1), condemning a parent, guardian or any other person with responsibility over a child who "[i]ntentionally, knowingly or recklessly" "acts in a manner likely to be injurious to the physical, mental or moral welfare of the child" or "does or fails to do any act, including failing to report a missing child, with the result that the child becomes a

[14] Note, however, that 11 Del. C. § 1104, establishing a defense to endangering the welfare of a child for treating an ill child with prayer, is retained as a defense to reckless endangerment in proposed Section 1204. Under current law, this defense only applies where a child's physical welfare is recklessly endangered, not knowingly or recklessly caused, by the parent's refusal to seek medical care or treatment. So although current § 1102 is not retained (since it is coextensive with other offenses), the defense still ought to apply to the same situations under the Proposed Code that would instead be prosecuted under reckless endangerment.

neglected or abused child," is vague, failing to meaningfully define prohibited activity that would put a person on notice that the person is violating the law.[15] 11 Del. C. §§ 1102(a)(1)a., b.

11 Del. C. §§ 1102(a)(4)-(6) are better considered as sentencing considerations rather than separate offenses. Those provisions make it an additional offense to commit certain offenses in the aural or visual presence of a minor. Although exposure to crime certainly could traumatize a minor, there is no appropriate way to punish that harm in the Proposed Code. For consistency, a general grade adjustment could be added to Section 804 increasing the grade of any offense committed in the presence of a minor; but, that would double the available punishment for the underlying offense—a substantial and unjustifiable escalation. If left as a separate offense, the offender would not be exposed to any additional punishment for the additional harm, because the offender would already have been convicted of a more serious offense. If the offense resulted in the kinds of harm to the minor found in the grading provisions of § 1102(b), the offender would be guilty of those more serious offenses, making this offense unnecessary yet again.

11 Del. C. § 1102(a)(7) will be addressed in Chapter 5200, which deals with all drug offenses. Finally, 11 Del. C. §§ 1102(b) and (c) have not been retained at all because they are fundamentally inconsistent with the Proposed Code, but more importantly, are also unconstitutional. 11 Del. C. § 1102(c) creates an impermissible, irrebuttable presumption of culpability as to causation where any of the offenses enumerated in § 1102(a) result in some kind of injury to the child. Without that presumption, the result-based grading scheme in § 1102(b) becomes moot, because it is coextensive with other preexisting offenses, namely homicide, aggravated assault, and a variety of sexual offenses.

Comment on Section 4401. Incest

Corresponding Current Provision(s): 11 Del. C. § 766

Comment:

Generally. This provision prohibits sexual relations between certain family members.

Relation to current Delaware law. Section 4401 is substantively similar to the current § 766, but with a number of changes for simplicity and clarity. First, Section 4401(a)(1) expands upon the current offense to prohibit "oral or object penetration" between family members, in addition to "sexual intercourse." This conduct merits inclusion because it addresses invasive sexual acts not encompassed within the definition of sexual intercourse, such as oral sex and vaginal or anal penetration with sexual devices. Second, Subsection (a)(2) adds a culpability requirement of knowledge as to the relationship between the parties. The current offense does

[15] A statute is void for vagueness if it fails to give a person of ordinary intelligence fair notice that the person's contemplated behavior is forbidden by the State, or if it encourages arbitrary or erratic enforcement. *State v. Baker*, 720 A.2d 1139, 1147 (Del. 1998). "[T]he terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties . . . ; and a statute which either forbids or requires the doing of an act so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process." *State v. J.K.*, 383 A.2d 283, 291 (Del. 1977) (citation omitted). In this instance, 11 Del. C. § 1102(a)(1) is vague because a prohibition on acting "in a manner likely to be injurious to the physical, mental, or moral welfare of [a] child" or in a way that results in a child becoming neglected or abused is not sufficiently explicit to put a person on notice that the person is violating the law. In addition, the prohibition is not sufficiently explicit to prevent arbitrary or erratic enforcement.

not have a culpability requirement, so "recklessness" would be read into the provision under 11 Del. C. § 251(b). It seems, though, that only a person who knows the relationship is illicit could be deserving of a sentence of imprisonment. Third, Subsection (a)(2)(A) specifies that any of the relationships in Subsection (a)(2)(B) could be by blood, marriage, or adoption. By using the word "blood" alone, without exception, the term should include illegitimate children and both half- and full-blooded relatives. Fourth, Subsection (a)(2)(B) simplifies the list of enumerated relationships in § 766(a) by distilling them without reference to the relative genders of the persons involved.

Section 4401(b) retains the grade of § 766.

Family Court Jurisdiction. 11 Del. C. § 766, stating that incest is "an offense within the original jurisdiction of the Family Court," has not been retained. 10 Del. C. § 922, the general grant of jurisdiction for the Family Court, already gives the court original jurisdiction over incest cases, making 11 Del. C. § 766 unnecessary.

Comment on Section 4402. Bigamy

Corresponding Current Provision(s): 11 Del. C. §§ 1001–03

Comment:

Generally. This provision prohibits marriage by persons already married.

Relation to current Delaware law. Section 4402(a) directly corresponds to the offense definition in 11 Del. C. § 1001. The definition has been separated by Subsection into constituent elements to make clear that either party to a later marriage can be guilty of the offense. Note that because no culpability requirement is specified, recklessness applies to all the elements of the offense—including whether the defendant already has a spouse—under proposed Section 205. Additionally, the provision in § 1003 that a person can be guilty of bigamy even if the second marriage took place in another state, has not been retained. There, the specific harm is not that the couple has committed a harm distinct from bigamy, but that Delaware acquires jurisdiction over the offense once the couple moves to the state. The general jurisdictional provision in Section 105 is broad enough to cover this situation.

Section 4402(b) directly corresponds to the defense in § 1002(2) for a spouse who has been separated for at least 7 years and has no knowledge whether the other spouse is living. The defenses in § 1002(1), (3), and (4) have not been retained as the defenses yield an identical result to a situation where the defendant is less than reckless as to the element of already having a spouse. Under the proposed Section, to be liable for bigamy, a defendant must be reckless as to the fact that he was already married. If the defendant does not have this reckless belief—in other words, if he is negligent as to the belief, or reasonably believes he is not married—then he does not satisfy the offense definition. The current defense provisions would only be useful if they provided a defense to a defendant whose culpability is equal to or greater culpability than that required by the offense itself. Thus, if the provisions provide a defense for non-negligent belief, the provisions are unnecessary as the defendant would not satisfy the offense definition in the first place. But, under Section 4402(a)(1), the defendant could be negligent as to already having a spouse and not be guilty of bigamy. For this same reason, the phrase "did not know" in Section 4402(b) has been substituted for "had no reasonable grounds to believe" in § 1002(2) because of the discrepancy between the culpability requirement in the current law and the defense's inherent

usefulness. It allows the defendant to be reckless as to whether he still has a spouse—which would generally expose the person to liability under Section 4402—and still receive a defense. The defense's value lies in the time that has passed, which justifies giving a defense to a defendant with a higher culpability level. Otherwise, the defense would have no effect.

Section 4402(c) retains the current grade for bigamy.

Comment on Section 4403. Child Abandonment

Corresponding Current Provision(s): 11 Del. C. §§ 1101, 1102A

Comment:

Generally. This provision defines an offense penalizing parents or legal guardians who leave a child without adequate supervision for an extended period of time, thereby jeopardizing the child's welfare.

Relation to current Delaware law. Section 4403(a) is substantively similar to the offense in 11 Del. C. § 1101, but amends current law with a few linguistic changes to improve clarity. Subsection (a)(2) substitutes the word "leaves" for "deserts," because desertion is a more specific term that might require definition. The subjective elements of the offense are sufficiently specific that the particular objective act need not be. Additionally, Subsection (a)(3) refers to intentionally ending care or custody, rather than "intending to permanently abandon the child." Using the word "abandon," without more, to define child abandonment is tautological as under current law, a defendant is guilty of the abandonment of a child when "the person deserts the child in any place intending permanently *to abandon the child*." 11 Del. C. § 1101. The change in language effectively defines abandonment by consistent reference to the defendant's unique position of responsibility for the child.

Section 4403(b) directly corresponds to current § 1102A, but breaks the defense into its elements for easier reading and application.

Section 4403(c) preserves the grading distinctions in § 1101, based upon the age of the abandoned child. Yet, each grade is set at one grade lower than current law provides for the same conduct. The legislation authorizing this Proposed Code mandates that "disproportionate" statutes be identified and rectified. The proportionality of an offense's authorized punishment is directly tied to the grade assigned to that offense. An offense's grade could be either disproportionately high *or* low. The nonpartisan consultative group supervising the drafting process for this Proposed Code has scrutinized the relative grading of all offenses, and has decided that this offense's grade is disproportionately high when compared to other offenses of the same grade in current law. The grade of this offense has been changed to reflect that judgment.

Comment on Section 4404. Interference with Custody

Corresponding Current Provision(s): 11 Del. C. §§ 785

Comment:

Generally. Section 4404 defines and grades the offense of interference with custody. This offense prohibits a person from either: (1) taking a child younger than sixteen years of age from his or her lawful guardian if they are a relative of that child, or (2) taking anyone entrusted by law to the custody of another or an institution, when that person knows the person has no legal right to do so.

Relation to current Delaware law. Section 4404 corresponds to 11 Del. C. § 785, but breaks § 785 into subsections for clarity; Section 4404(a) defines the offense and Section 4404(b) grades the offense in accordance with the grading scheme in § 785. Section 4404(a) corresponds to the offense definition in § 785, but slightly rewords it for clarity and separates the offense conduct into its elements for easier reading and application. Note that the proposed Subsection (a)(1)(2) removes the outdated phrase "incompetent person" and replaces it with "a person entrusted by authority of law to the custody of another person or an institution," as it is described in § 785(b).

Note that current law organizes Interference with Custody alongside the offenses of Kidnapping and Unlawful Imprisonment. All those offenses have similar conduct elements; but, the harm involved is quite different. Interference with Custody is a harm to the family arrangement that the courts have recognized as best for the person whose custody is at issue, rather than a harm to the liberty and autonomy of that person. This harm aligns more closely with other offenses against the family; therefore, Interference with Custody has been placed in Chapter 4400 instead of Chapter 1400.

Comment on Section 4405. Harboring or Assisting a Runaway

Corresponding Current Provision(s): 11 Del. C. §§ 1102(a)(3), (b)(4)

Comment:

Generally. This provision creates an offense penalizing adults who harbor or assist a child in running away from home without parental consent.

Relation to current Delaware law. Section 4405(a) corresponds to 11 Del. C. 1102(a)(3). The two provisions are materially the same, except for Subsection (a)(2). 11 Del. C. § 1102(a)(3) simply prohibits "knowingly and illegally harbor[ing] a child who has run away from home;" but, the word "harbor" requires definition. On its face, a person who shelters a child temporarily while notifying law enforcement of the child's location and safety would still be subject to liability under § 1102(a)(3). Subsection (a)(2)(A) suggests a minimum amount of time that the defendant must have sheltered the child before it becomes illegal harboring. Additionally, Subsection (a) contains the phrase "except as authorized by law" to exempt emergency youth shelters and other similar institutions from prosecution under Section 4405.

Section 4405(b) retains the grade given in § 1102(b)(4).

Comment on Section 4406. Contributing to the Delinquency of a Minor

Corresponding Current Provision(s): 11 Del. C. §§ 1100(3), 1102(a)(2), 1102(b)(4), 1106

Comment:

Generally. This provision covers conduct by an adult that contributes to the delinquency of a minor by knowingly inducing the minor to participate in criminal activity.

Relation to current Delaware law. Section 4406(a)(1) corresponds to 11 Del. C. § 1102(a)(2), but defines the offense with greater specificity in several ways. First, Subsection (a) adds a requirement the offense only apply to defendants who are at least 4 years older than the child whose delinquency is encouraged. This ensures a sufficient gap in age between the offender and the victim to justify liability for a failure to act. Technically, this makes it possible for minors to be defendants (e.g., the parties are 13 and 17 years of age). But note that the provisions pertaining to the treatment of minors – addressed outside of the Proposed Code, in Title 10 – are available in appropriate cases to prevent criminal liability where the defendant is a minor. Second, Subsection (a)(1) makes the offense's focus on causation more explicit, which makes in unnecessary to include language specifying that the defendant's act or failure to act may be only one of several factors leading to the child's delinquency. Third, Subsection (a)(1) avoids use of the word "delinquent" by including in the offense definition the result that the child actually engages in an offense. That way, delinquency need not be separately defined, as it is in § 1100(3).

Subsection (a)(2) corresponds to § 1106, which prohibits permitting a child under 18 to be in a place where specified unlawful activities are taking place. That offense is preserved in Section 4406(a)(2), but in a generalized form to capture any risk to a child's delinquency, beyond those enumerated in § 1106.

Section 4406(b) retains the grades given in §§ 1102(b)(4) and 1106.

Comment on Section 4407. Persistent Non-Support

Corresponding Current Provision(s): 11 Del. C. § 1113

Comment:

Generally. This provision creates liability for persons who habitually fail to provide financial support for their children.

Relation to current Delaware law. Section 4407(a) corresponds to the definitions of criminal nonsupport and aggravated criminal nonsupport in 11 Del. C. §§ 1113(a)–(b). The distinctions between those offenses have, in part, been preserved in the grading provisions in Subsection (b). The offense incorporates § 1113(e), which specifies it is not a defense that the child was receiving support from other sources. Additionally, provision of medical care has been added to Subsection (a)(2)(A) to more comprehensively cover the kinds of support a parent is expected to provide for his or her children.

Section 4407(b) grades the offense depending on whether there is an outstanding, unsatisfied support order, and if so, also depends on the amount in arrears and how long it has been in arrears. Subsection (b)(1) corresponds to the grading scheme currently in place for aggravated criminal nonsupport, while Subsection (b)(2) corresponds to that for ordinary

criminal nonsupport. The grade aggravations for repeat offenders have not been retained because they have been incorporated into the general grade adjustment in Section 804.

Section 4407(c) corresponds to § 1113(i), which allows a court to allocate fines paid to the court to support for the child who needs it. It also requires that if a support order is in effect, the fine paid to the court must be used to satisfy the court order. Section 4407(c) slightly alters those provisions, however, by making clear that any money paid out by the court is not counted as satisfying the fine owed to the court. If that were the case, then the offender's payment would be double counted, satisfying both his fine and any support owed. That result would both dilute the fine's value as punishment and reward the offender for waiting as long as possible to pay support.

Section 4407(d) retains two defenses from current law. Subsection (d)(1) retains the defense in § 1113(c) by giving the defendant an opportunity to cure the failure to meet the support obligation. This makes sense if the purpose of the offense is to stimulate payment of support obligations. Subsection (d)(2) retains the defense in § 1113(d) for defendants who are unable to make support payments due to circumstances outside their control.

Section 4407(e) directly corresponds to evidentiary provisions in § 1113(f)–(g).

Civil Liability. 11 Del. C. § 1113(h), which specifies that civil or administrative proceedings on the same support issues do not bar criminal liability, has not been retained, because Section 104 articulates the same policy more generally.

Restitution. 11 Del. C. § 1113(j)'s restitution requirement has not been incorporated because restitution is already generally required where applicable by Section 803.

Comment on Section 4408. Definitions

Corresponding Current Provision(s): 11 Del. C. § 1113(k)(2)

Comment:

Generally. This Section provides definitions of key terms used in this Chapter.

Relation to current Delaware law. Section 4408 provides a definition of "dependent child" that corresponds to the definition currently found in 11 Del. C. § 1113(k)(2). The definition includes all persons less than 18 years of age, and also incorporates the policy of 11 Del. C. § 1113(k)(2), requiring a parent to continue supporting his or her child who is 18 years of age and still enrolled in high school. Yet, § 1113(k)(2) further requires that it be likely that the 18 year old child will graduate from high school. It is unnecessary to put judges in the position of evaluating a child's academic standing to determine the child's likely graduation. Therefore, Section 4408 does not include that requirement. Instead, the definition only requires that the 18 year old child be enrolled in school.

CHAPTER 4500. GAMBLING OFFENSES

Section 4501. Unlawful Gambling and Betting Practices
Section 4502. Cheating and Related Practices
Section 4503. Definitions

General Comment on Chapter 4500

Corresponding Current Provision(s): 11 Del. C. §§ 1409, 1412, 1428, 1431; *see also* §§ 1421, 1422, 1423, 1424, 1425, 1426, 1427, 1428

Comment:

Generally. A number of current provisions in Title 11 and elsewhere that might have been included in Chapter 4500 have not been included, for various reasons.

Obstructing Law Enforcement Investigations of Illegal Gambling Operations. 11 Del. C. § 1428 prohibits individuals from obstructing law enforcement investigation of illegal gambling operations by maintaining a physical barrier. This provision has not been retained in Chapter 4500 because it is redundant with two proposed offenses: Sections 3302 (Resisting or Obstructing a Law Enforcement Officer) and 3304 (Obstructing Administration of Law or Other Government Function). Thus, the obstruction covered by § 1428 and its procedural requirements in 11 Del. C. §§ 1421–27 would be a violation of the Code without these individual provisions. If this lesser obstruction offense and all of its accompanying procedures are nonetheless deemed necessary, they should be moved to an administrative title where they are not duplicative of other offenses.

Revoking or Denying Service Contract Where Used for Gambling. 11 Del. C. § 1412 has not been retained in Chapter 4500 because it is purely administrative in nature and affects public utilities. It is more appropriately suited for a regulatory title dealing with gambling or public utilities.

Execution of Public Duty Justification Defense. 11 Del. C. § 1409 provides for a justification defense where the conduct in question was an exercise of law enforcement authority. This provision has not been retained in Chapter 4500 because there is already a defense for the execution of public duty in Section 303 of the General Part.

Telephone Evidence. 11 Del. C. § 1431 contains a provision dealing with telephone evidence. This provision has not been retained in Chapter 4500. If this provision is inconsistent with Delaware's general Rules of Evidence, then it leads to disproportionate punishment of persons accused of gambling due to different rules of admissibility. On the other hand, if this provision is consistent with the Rules of Evidence, then it is unnecessary to separately codify the rule in the gambling context.

Comment on Section 4501. Unlawful Gambling and Betting Practices

Corresponding Current Provision(s): 11 Del. C. §§ 1326, 1401, 1402, 1403, 1404, 1405, 1406, 1407, 1408, 1411, 1413

Comment:

Generally. Section 4501 prohibits unlawful gambling or betting and providing premises for gambling.

Relation to current Delaware law. Subsection 4501(a) defines the offense of unlawful gambling or betting by synthesizing conduct found in various gambling provisions throughout Delaware's current criminal code. The "except as authorized by law" clause in Section 4501(a) covers the exceptions found in both 11 Del. C. § 1403 (for licensed horse racing or betting) and 11 Del. C. § 1405(c)(2) (for certain authorized gambling devices).

Section 4501(a)(1) covers the conduct defined in 11 Del. C. § 1401 to the extent this conduct is not already covered by the definition of a "lottery ticket" in Section 4503(b) or the catch-all provision for acts committed for financial benefit in Section 4501(a)(6). Two provisions from § 1401 have not been retained in Subsection (a)(1). First, the "possession with intent to" conduct in § 1401(1) has not been retained because the inchoate offense in proposed Section 708 (Possessing Instruments of Crime) is broad enough to include that situation. Second, the "lottery policy writing" conduct in § 1401(3) has not been retained because the catch-all provision in Subsection (a)(6) covers "participation" in gambling activities generally, meaning that the creation of lottery tickets that will be sold is prohibited. Because the proposed scheme prohibits creating lottery tickets only when those tickets will be sold, 11 Del. C. § 1408 ("Merchandising plans are not gambling") is unnecessary; free chances to win prizes are not prohibited. The only aspect of § 1408 that has been retained in Subsection (a)(1) is the exception clause, which allows lottery tickets to be sold to raise funds for a charitable purpose.

Section 4501(a)(2) corresponds to 11 Del. C. § 1403(3), but makes a few minor changes. First, Subsection (a)(2) adds the term "receives" to the conduct defined to reflect the fact that receiving a bet includes not only recording information about the amount of bets and debts, but also collecting the money. Second, Subsection (a)(2) uses only the term "bet" to refer to both bets and wagers. "Wagers" should be included in "bets" throughout Section 4501. Finally, Subsection (a)(2) does not cover simple "agreement" or receipt of money "with the intent to bet or wager" because those acts are already covered by the inchoate offenses in proposed Sections 701 (Criminal Attempt) and 703 (Criminal Conspiracy).

Section 4501(a)(3) corresponds to 11 Del. C. § 1403(4). Subsection (a)(3) includes the phrase "on behalf of any person" to indicate that it applies to both direct and indirect betting. Note that rather than defining the term "trial or contest" within the offense definition itself, it is defined in Section 4503 with the rest of the relevant terms used in this Chapter.

Section 4501(a)(4) corresponds to 11 Del. C. § 1411. The specific provision in § 1411(1) about public utilities furnishing a private wire for use in disseminating information in furtherance of gambling has not been explicitly retained in Subsection (a)(4) because the conduct is already covered by the "catch-all" in Subsection (a)(6). If a public utility installed a private wire, knowing it would be used for gambling activities, it would satisfy the "financial benefit" requirement of Subsection (a)(6) because it would be paid for this service, and it would satisfy the knowledge requirement of Subsection (a)(6).

Section 4501(a)(5) covers the conduct in 11 Del. C. §§ 1405(a) and 1406(a)(1)–(2). Note that the conduct described in the other subsections of §§ 1405 and 1406 has not been included in Subsection (a)(5) because it is either already covered by either the inchoate offense of attempt, or complicity, or is redundant with other provisions in the Proposed Code. Although the term "slot machine" is currently defined with the other gambling definition in 11 Del. C. § 1432(h), it is not defined in Subsection (a)(5) or otherwise in Chapter 4500 because its meaning is self-evident. The final clause of Subsection (a)(5), stating that the gambling device must be "less than 25 years old" to be covered by this Section, accounts for the "antique slot machine" exception in § 1406(c).

Section 4501(a)(6) is a "catch-all" provision for other persons who benefit financially from the conduct described in Subsections (a)(1)–(5), but may not directly engage in the offense conduct. Subsection (a)(6) covers the "concerned in interest" features of 11 Del. C. §§ 1401 and 1403, as well as various other forms of conduct not specifically enumerated in Subsections (a)(1)–(5) (noted in the Commentary above for each Subsection). Subsection (a)(6) both requires that the offender benefit financial from investment, participation, or acquiescence in conduct in violation of Subsection (a) and establishes a knowledge requirement. Note that to satisfy the knowledge requirement, the offender need not know that the activity is illegal; rather, she need only be aware of the qualities and circumstances of the activity that make it illegal under Section 4501(a). For example, a defendant who has financially invested in a lottery not run by the State *knows* that the enterprise is a private lottery. The fact that the lottery is privately run is what makes the lottery unlawful, but the defendant does not have to know that private lotteries are *unlawful* to be prosecuted under Subsection (a)(6).

Section 4501(a)(7) corresponds to 11 Del. C. § 1407's offense for playing craps, but with some minor changes. First, Subsection (a)(7) removes the reference to "crap games" in the offense definition and, instead, simply describes the term. Second, Subsection (a)(7) removes the provision in § 1407 that penalizes being "knowingly present" at a crap game. One cannot be criminally liable without in some way furthering the illicit activity. To the extent someone who is "knowingly present" at a crap game is also actively supporting the activity, accomplice liability in proposed Section 211 will cover the conduct.

Section 4501(b) defines the offense of providing premises for gambling. Subsection (b) corresponds to 11 Del. C. § 1404, but with some changes to the language and structure for easier reading and application. Subsection (b) also incorporates portions of 11 Del. C. § 1403(2) that have not been retained as separate provisions because they are redundant with this offense. Note that because the grading of §§ 1403(2) and 1404 conflict, this Section maintains the grade of the offense dealing primarily with premises used for gambling, § 1404. The grade aggravation in § 1404, increasing the grade for repeat offenders, has not been retained in this Section because the general grade adjustment in Section 804 covers all such situations.

Section 4501(c) corresponds to 11 Del. C. § 1413 to provide an exception to liability under Section 4501 for engaging in gambling or lottery activities under the State's control. Note that because Section 4501(c) establishes that the only exception to the prohibition on selling lottery tickets is when those lottery tickets are under Delaware control, the separate provision in 11 Del. C. § 1402 prohibiting the sale of foreign lottery tickets is unnecessary. Foreign lotteries are necessarily not under State control, and thus fall into the general prohibition on the sale of lottery tickets in Section 4501(a)(1).

Section 4501(d) grades the offenses in Sections 4501(a)–(b). Subsection (d)(1) grades the offense defined in Section 4501(a)(1)–(6). Subsection (d)(1)(A) corresponds to the grade in 11

Del. C. § 1326(c) to make all gambling activity a Class F felony where it occurs in the context of animal fighting. Subsection (d)(1)(B) corresponds to 11 Del. C. §§ 1401, 1403, 1405, and 1411 to make gambling activity a Class A misdemeanor in all other cases. Subsection (d)(2) grades playing craps as a violation. Subsection (d)(3) grades the offense defined in Section 4501(b) as a Class D misdemeanor.

Section 4501(e) lists terms defined in Section 4503. Refer to the Commentary for Section 4503 for an explanation of how each of the defined terms relates to current Delaware law.

Comment on Section 4502. Cheating and Related Practices

Corresponding Current Provision(s): 11 Del. C. § 1470, 1471, 1472; *see also* 1473, 1474

Comment:

Generally. Section 4502 creates an offense prohibiting cheating and related practices. The offenses that make up this Section currently fall under a subpart in Delaware law for "Offenses Involving Video Lottery Machines." But, several of the offenses actually cover more conduct than that relating to video lottery machines. Therefore, this proposed Section 4502 unifies these provisions based on a different common theme among them: cheating.

Relation to current Delaware law. Section 4502(a) defines the offense of cheating. Subsection (a)(1) is based on the definition of "cheat" in 11 Del. C. § 1470(a). The specific offenses related to cheating in 11 Del. C. § 1471(a) and (d) are subsumed by this broader offense definition. The cheating offense in 11 Del. C. § 1471(b) is not included in this Subsection because it is already covered by the proposed inchoate offense of Possessing Instruments of Crime in Section 708. Subsection (a)(2) corresponds to 11 Del. C. § 1471(l), except to the extent it deals with possession, as that conduct is covered by Section 708 (Possessing Instruments of Crime).

Section 4502(b) defines the offense of contest rigging. This Section corresponds to 11 Del. C. § 1471(k), but breaks it into its constituent elements for easier reading and application.

Section 4502(c) defines the offense of unfair wagering, corresponding to 11 Del. C. § 1471(f), (i), and (j).

Section 4502(d) grades the offenses in Sections 4502(a)-(c). Note that the grading scheme in Section 4502(d) does not include the mandatory restitution provided for in 11 Del. C. § 1472(e) because mandatory restitution is already provided by Section 803 of the General Part. Subsection (d)(1) grades the offense defined in Section 4502(a) as a Class A misdemeanor, preserving the grade in 11 Del. C. § 1472(a). Subsection (d)(2) grades the offense defined in Section 4502(b) as a Class 8 felony, corresponding to the maximum sentence provided for in 11 Del. C. § 1472(c). Subsection (d)(3) grades the offense defined in Section 4502(c) based upon the current scheme in 11 Del. C. § 1472(b), which matches the value thresholds for unfair wagering to the value thresholds for theft offenses. Subsection (d)(3) retains this scheme, but alters the value thresholds to match the proposed value thresholds in Section 2101 of the proposed Chapter on theft. Note also, that like Subsections 2101(b)(7)-(8) and 2304(b)(1)(G)-(H), Subsections (d)(3)(G)-(H) contain a special mechanism establishing an even lower grade – that of a violation – for a first offense. Grading these unfair wagering offenses as violations, rather than misdemeanors, represents a substantial departure from current law. Violaitons are not

crimes, and no imprisonement term may be authorized for violations. This is not simply a general preference which may be included in sentencing guidelines, but rather an absolute bar to imprisonment in all cases to which the violation grade applies. Thus, the discretion of sentencing judges in these cases is limited to the amount of fine to be imposed. In addition, by authorizing only monetary penalties for even intentional cheating – a truly blameworthy conduct – the proposed mechanism arguably blurs the line between civil and criminal responsibility. Besides, grading these offenses as violations imposes additional limitations. For instance, under 11 Del. C. § 1904, law enforcement officers are not authorized to arrest offenders commiting violations (a limitation that will apply to unfair wagering under Subsection d)(3)(H)). *See* Commentary to Section 802(a)(13) and 2101(b)(7)-(8). Nevertheless, Subsections (d)(3)(G)-(H) may give a first time offender committing a minor offense a chance for a cleaner path forward, along with an incentive not to re-offend. If the offender has been convicted of a prior offense of a similar nature (including not only offenses under Section 4502, but any property or other pertinent offenses, including offenses under Chapter 2100 [Theft and Related Offenses], or under Section 2304 [Criminal Damage]), the rationale for grading the offense as a violation would not apply, and it would be appropriately graded as a misdemeanor.

The aggregation provision in Subsection (d)(3)(I) corresponds to 11 Del. C. § 1472(d).

Section 4502(e) contains a forfeiture provision, corresponding to 11 Del.C § 1472(f). Unlike § 1472(f), Subsection (e) directly incorporates the definitions of "cheating device" and "paraphernalia" within the text, instead of relying upon the terms themselves. For instance, "paraphernalia" is defined by 11 Del. C. § 1470(c) as " . . . [the] materials that are intended for use or designed for use in [the production of] . . . a counterfeit facsimile of the chips, tokens, debit instruments or other wagering devices approved by the State Lottery Office." Subsection 4502(e)(a) incorporates the current Delaware definition into the text by providing that defendants forfeit "materials intended to be used to manufacture devices for cheating."

Section 4502(f) lists terms defined in Section 4503. Refer to the Commentary for Section 4503 for an explanation of how each of the defined terms relates to current Delaware law.

Provisions Covered by Theft Offenses Not Retained. 11 Del. C. § 1471(c), (g), and (h) have not been included in Section 4502 because they are covered by either Section 2102 (Theft by Taking) or Section 2103 (Theft by Deception). The various parts of § 1471(e) are covered by either Section 2103 (Theft by Deception), Section 211 (Complicity), or Section 708 (Possessing Instruments of Crime).

11 Del. C. § 1473 has not been retained because proposed Section 210 governs the issue of when multiple prosecutions or convictions are allowed.

Detention of Suspected Cheaters. 11 Del. C. § 1474 has not been incorporated into Chapter 4500 because it is preserved as a form of the defense of property justification defense in Section 307.

Jurisdiction. Section 4502 does not incorporate 11 Del. C. § 1472(f), which provides that "The Courts of the Justices of the Peace shall have concurrent jurisdiction with the Court of Common Pleas for misdemeanor offenses under this subpart and the Superior Court shall have exclusive jurisdiction for felony offenses under this subchapter." The Superior Court already has exclusive jurisdiction for felony criminal offenses, making that part of the provision unnecessary. The misdemeanor provision should be incorporated into general provision setting forth the jurisdiction of the Courts of the Justices of the Peace.

Comment on Section 4503. Definitions

Corresponding Current Provision(s): 11 Del. C. §§ 1401(1)-(2), 1403(1), 1432(c), 1432(e), 1470(d)–(e)

Comment:

Generally. This section collects all defined terms used in Chapter 4500.

Relation to current Delaware law. Section 4503(a) defines "gambling device," corresponding directly to 11 Del. C. § 1432(c). Section 4503(b) defines "lottery ticket," summarizing the situations described in 11 Del. C. § 1401(1)-(2). Section 4503(c) defines "private wire," corresponding to, but simplifying the definition in 11 Del. C. § 1432(e). Section 4503(d) defines "table game," corresponding directly to 11 Del. C. § 1470(d). Section 4503(e) is a new definition for "trial or contest" based upon 11 Del. C. § 1403(1). Section 4503(f) defines "video lottery machine," corresponding to, but simplifying the definition in 11 Del. C. § 1470(e).

CRIME CONTROL OFFENSES

CHAPTER 5100. OFFENSES INVOLVING FIREARMS AND OTHER DEADLY WEAPONS

Section 5101. Possessing a Firearm or Deadly Weapon During Commission of an Offense; Supplying a Firearm for Felonious Possession
Section 5102. Dealing in Unlawful Weapons
Section 5103. Carrying a Concealed Deadly Weapon or Dangerous Instrument
Section 5104. Possessing or Purchasing Deadly Weapons by Persons Prohibited
Section 5105. Providing Weapons to Disqualified Persons
Section 5106. Possessing a Firearm While Under the Influence of Drugs or Alcohol
Section 5107. Offenses Related to Background Checks for Firearm Sales
Section 5108. Grade Adjustment for Offenses Committed in a Safe School and Recreation Zone
Section 5109. Definitions

General Comment on Chapter 5100:

Corresponding Current Provision(s): 11 Del. C. §§ 1441A, 1441B, 1450, 1451, 1461

Comment:

Generally. A number of current provisions in Title 11 and elsewhere that might have been included in Chapter 5100 have not been included, for various reasons. This Comment explains each of those choices.

Reporting Requirement. 11 Del. C. § 1461 makes it a crime to fail to report the loss or theft of a firearm to the appropriate law enforcement agency within 7 days of the discovery of the loss or theft. This offense has not been retained in Chapter 5100 because reporting is primarily a regulatory requirement of ownership and would be more appropriately placed in a corresponding regulatory title. Moreover, the current punishment for the offense in § 1461(b) is very low (fines from $75-250); the only substantial punishment authorized is for a repeat offense (Class G felony).

Theft of or Receiving a Stolen Firearm. 11 Del. C. § 1450 and 1451 specifically prohibit the taking of a firearm or the receipt of a stolen firearm. These offenses have not been retained in Chapter 5100 because they are already covered by proposed theft offenses in Chapter 2100.

Implementation of federal Law Enforcement Officers Safety Act of 2004. 11 Del. C. §§ 1441A and 1441B implement a federal law authorizing qualifying law enforcement officers, both active and retired, to carry concealed firearms. This authorization is not connected to substantive criminal law or punishment, and is therefore not incorporated into Chapter 5200. These sections should be relocated to a more appropriate regulatory Title of the Delaware Code.

Comment on Section 5101. Possessing a Firearm or Deadly Weapon During Commission of an Offense; Supplying a Firearm for Felonious Possession

Corresponding Current Provision(s): 11 Del. C. §§ 1445, 1447, 1447A

Comment:

Generally. Section 5101 combines two separate provisions in current Delaware law to create an offense prohibiting individuals from possessing a firearm or deadly weapon during the commission of a felony and supplying a firearm to another for use in other offenses.

Relation to current Delaware law. Section 5101(a) defines the offense of possession of a firearm or deadly weapon during a felony, corresponding closely to 11 Del. C. §§ 1447(a) and 1447A(a). Section 5101(a) retains the basic language of the offense definitions in §§ 1447(a) and 1447A(a).

Section 5101(b) defines the offense of supplying a firearm for use during certain offenses, corresponding closely to 11 Del. C. § 1445(5). Section 5101(b) retains the language of the offense definition in § 1445(5), but separates it into its elements for easier reading and application.

Section 5101(c) grades the offenses in Section 5101(a) and (b), retaining the current grades for the corresponding offenses in §§ 1447(a), 1447A(a), and 1445(5).

Section 5101(d)–(e) correspond to an additional requirement and limitation established by the Delaware Supreme Court. The requirement in Subsection (d), that the defendant be convicted of the underlying felony, is based upon the Delaware Supreme Court's holding in *Priest v. State*.[16] The condition in Subsection (e) that, to satisfy the offense conduct, one need not use or intend to use the firearm or deadly weapon to further the commission of the offense, is based upon the Court's holding in *Poli v. State*.[17]

Section 5101(f) lists defined terms referenced in the offense definition. Those terms are defined in Section 5109. Reference the Commentary to Section 5109 for an explanation of how each of the defined terms relates to current Delaware law.

Meaning of "Possession." For the purposes of this Section, the meaning of the term "possession" is governed by proposed Section 204 of the General Part.[18]

Provisions in 11 Del. C. §§ 1447 and 1447A Not Retained. A number of provisions in 11 Del. C. § 1447 have not been retained in Section 5101. First, 11 Del. C. § 1447(b)–(c), which cover issues of suspension of sentences, good time, parole and probation, and concurrent versus consecutive sentences, have not been retained. The Proposed Code is not intended to address all issues regarding the sentencing and disposition of offenders. It is anticipated that such issues will be more comprehensively dealt with in other statutory chapters on sentencing or in a set of SENTAC sentencing guidelines.

Second, § 1447(d), which covers the issue of minors being tried as adults, has not been retained because issues pertaining to the treatment of minors are addressed outside of the Proposed Code, in Title 10. Finally, § 1447(e), which covers the issue of lesser-included offenses, has not been retained because that issue is governed by proposed Section 210

[16] *See Priest v. State*, 879 A.2d 575 (Del. 2005) (holding that, to be convicted of an offense under 11 Del. C. §§ 1447 or 1447A, a defendant must also be convicted of the predicate felony).

[17] *See Poli v. State*, 418 A.2d 985 (Del. 1980) (holding that neither 11 Del. C. §§ 1447 nor 1447A require the weapon be used or intended for use in the felony; mere possession is enough).

[18] *Cf. Lecates v. State*, 987 A.2d 413 (Del. 2009) (defining "possession" according to the Uniform Controlled Substances Act).

(conviction when the defendant satisfies the requirements of more than one offense or grade) of the General Part.

A number of provisions in 11 Del. C. § 1447A have also not been retained in Section 5101. First, § 1447A(b)–(c), which cover issues of minimum sentencing, have not been retained because all minimum sentencing provisions in the Proposed Code are set forth in Section 802. Second, § 1447(d)–(g), which mirror the provisions in § 1447(b)–(e), have not been retained for the same reasons as stated above. Issues of suspension, good time, parole, and probation, and concurrent and consecutive sentences should be covered by sentencing principles generally applicable to all offenses in Delaware law. Issues of minors being tried as adults are addressed outside of the Proposed Code, in Title 10, and issues of lesser-included offenses are governed by proposed Section 210 of the General Part.

Comment on Section 5102. Dealing in Unlawful Weapons

Corresponding Current Provision(s): 11 Del. C. §§ 1444(b), 1445, 1446, 1446A, 1452, 1453, 1459

Comment:

Generally. Section 5102 provides two conceptually related offenses prohibiting dealing in unlawful weapons, which includes such acts as: trafficking a firearm with an altered serial number; selling, buying, or possessing certain dangerous weapons; and supplying undetectable knives to specific categories of individuals. This Section consolidates a number of a distinct provisions in current Delaware law to create one, cohesive Section.

Relation to current Delaware law. Section 5102(a) defines the offense of trafficking a firearm with an altered serial number, corresponding directly to 11 Del. C. § 1459. Section 5102(a) retains the language of § 1459, but separates the offense definition into its elements for easier reading and application. Note that the year 1973 is incorporated from the exception for antique firearms contained in § 1459(b).

Section 5102(b) defines the offense of dealing in unlawful weapons. Generally, this Subsection covers the offense conduct in 11 Del. C. §§ 1444(a), 1445(1), 1446A(a), 1446, 1452, and 1453. Note that the "except as authorized by law" provision in Section 5102(b) covers the various exceptions enumerated in § 1444(b) because each of the exceptions are pursuant to a separate authorization under law.

Section 5102(b)(1) corresponds to 11 Del. C. § 1444(a), prohibiting the sale, purchase, or possession of a destructive weapon. Note that to the extent this offense covers bombs, it is distinguishable from Section 2303 (unlawful incendiary devices) because this offense has no requirement of intent to cause injury, which is why it carries a lesser grade than Section 2303.

Section 5102(b)(2) corresponds to 11 Del. C. §§ 1446A(a), 1446, and 1452. Subsection (b)(2)(A) corresponds to § 1446A(a), but simplifies the description of an undetectable knife by removing much of the detail about what constitutes a knife. Note that because § 1446A(b) is purely regulatory and is irrelevant to the offense itself, it has not been retained in this Section and should instead be moved to regulatory title dealing with the manufacture of knives. In addition, note that Subsection (b)(2)(A) does not include the language in § 1446A(a) regarding commercial manufacture and import of undetectable knives because that conduct is captured by accomplice liability for the underlying offense. Subsection (b)(2)(B)(i) corresponds to § 1446 and Subsection (b)(2)(B)(ii) corresponds to § 1452.

Section 5102(b)(3) corresponds to 11 Del. C. § 1453. Section 5102(b)(4) corresponds to 11 Del. C. § 1445(1).

Section 5102(c) establishes an exception to liability under Subsection (b)(2)(A) where weapons are provided to special parties. This Subsection corresponds to the exceptions provided in 11 Del. C. § 1446A(c)–(d), but with two changes. First, Subsection (c) expands the exception to cover any weapons, not just undetectable knives. There appears to be no special reason for only making these exceptions for undetectable knives, so long as: (1) law enforcement or the military has proper authorization for stocking the weapons, and (2) historical societies and related institutions follow the specified procedures of safety and security. Second, unlike § 1446A(d), Subsection (c)(2) does not explicitly characterize the historical societies, museums, and institutional collections as "federal, state, or local," because this language necessarily encompasses all historical societies, museums, and institutional collections and, thus, is superfluous.

Section 5102(d) grades the offenses in the preceding Subsections. Subsection (d)(1) grades the offense in Subsection (a), corresponding to the grade in § 1459(c). Subsection (d)(2) grades the offense in Subsection (b)(1), corresponding to the grade in § 1444(b). Subsection (d)(3) grades the offense in Subsection (b)(2)(A), corresponding to the maximum punishment allowed in § 1446A(a), but assigning a different grade letter to reflect the new comprehensive grading scheme. Subsection (d)(4) grades all other offenses as Class B misdemeanors, striking a balance between the current grades of the remaining offenses that have been consolidated in this Section.

Section 5102(d)(5) provides for an upward grade adjustment where the offenses in this Section are committed within a Safe School or Recreation Zone. This provision takes into account the offense defined in 11 Del. C. § 1457, but treats it only as a grade adjustment for the offenses included in this Section, rather than as a separate offense. This change reflects the idea that multiplying convictions without increasing punishment is duplicative, and does not meaningfully affect the defendant's liability under the aggravating circumstances.

Section 5102(e) references a defined term, "destructive weapon," used in the Section. This term is defined in Section 5109. Refer to the Commentary to Section 5109 for an explanation of how the defined term relates to current Delaware law.

Comment on Section 5103. Carrying a Concealed Deadly Weapon or Dangerous Instrument

Corresponding Current Provision(s): 11 Del. C. § 1442, 1443 1445; *see also* 11 Del. C. § 1441.

Comment:

Generally. Section 5103 creates an offense for carrying a concealed deadly weapon or dangerous instrument, consolidating similar offenses currently codified separately in Delaware law.

Relation to current Delaware law. Section 5103(a) defines the offense, corresponding to 11 Del. C. §§ 1442 and 1443. Section 5103(a) retains the language of the current offenses, but separates them into their elements for easier reading an application. The phrase "except as authorized by law" allows any independent legal authorization to carry a concealed weapon to

act as an exception to the offense. This includes valid licenses to carry concealed weapons, making the affirmative defense in 11 Del. C. § 1442 unnecessary. The clause in Subsection (a)(1)(B) excepting disabling chemical sprays from the category of dangerous instruments corresponds to 11 Del. C. § 1443(c). The requirement in Subsection (a)(3) that the weapon or instrument be available and accessible for the person's immediate use is based upon the Delaware Supreme Court's decision in *Dubin v. State*.[19] This requirement would, for example, be satisfied if the defendant was driving a car and the concealed weapon was located in the car's glove compartment.

Section 5103(b) grades the offenses defined in the preceding Subsections. Subsection (c)(1) grades the offense in Subsection (a)(1)(A) as a Class 6 felony where the deadly weapon is a firearm and Class 8 felony in all other cases. The maximum punishments provided for by these grades correspond to those provided in 11 Del. C. § 1442, but the actual grade letters differ from those used in § 1442 to reflect the new comprehensive grading scheme. Subsection (c)(2) grades the offense in Subsection (a)(1)(B) as a Class A misdemeanor, corresponding directly to the grade in 11 Del. C. § 1443(d). Finally, Subsection (c)(3) provides for an upward grade adjustment where the offenses in this Section are committed within a Safe School or Recreation Zone. This provision takes into account the offense defined in 11 Del. C. § 1457, but treats it only as an upward grade adjustment for the offenses included in Section 5103, rather than as a separate office. As for other instances of this grade adjustment in Chapter 5100, this change reflects the idea that multiplying convictions without increasing punishment is mere duplication, not a meaningful addition to ultimate liability.

Section 5103(c) provides a defense to prosecution under Subsection (a)(1)(B) corresponding to the affirmative defense in § 1443(b).

Section 5103(d) lists defined terms referenced in the Section. These terms are defined in Section 5109. Reference the Commentary to Section 5109 for an explanation of how the defined terms relate to current Delaware law.

Note on 11 Del. C. § 1441. Section 5103 does not incorporate the regulations in 11 Del. C. § 1441 because they belong in an administrative title. The regulations in § 1441 establish who is authorized to carry concealed weapons and how individuals can acquire licenses to carry concealed weapons. These provisions are purely regulatory and have no analogue in the proposed revisions to this criminal Code.

Comment on Section 5104. Possessing or Purchasing Deadly Weapons by Persons Prohibited

Corresponding Current Provision(s): 11 Del. C. § 1448

Comment:

Generally. Section 5104 establishes an offense for possession or purchase of deadly weapons by specific classes of persons.

Relation to current Delaware law. Generally, Section 5104 is based upon 11 Del. C. § 1448, the current provision dealing with possession and purchase of deadly weapons by persons prohibited. Section 5104(a) defines the offense, maintaining the general structure of

[19] 397 A.2d 132 (Del. 1979) (interpreting language in current law that the weapon is "about the person" to mean it is available and accessible for the person's immediate use).

§ 1448, but further breaking the offense definition down into its elements. Subsections (a)(1)(A)–(B) correspond to § 1448(a)(1), but do not incorporate the language about jurisdiction or whether a weapon was used because this language is unnecessary and included by the proposed Subsection's broader language. Subsection (a)(1)(C) corresponds to § 1448(a)(3), but specifies only the drug offenses that are not already covered by the general provision on felonies in Subsection (a)(1)(A). Subsection (a)(1)(D) corresponds to § 1448(a)(7), but the references to specific offenses have been replaced with descriptions of the harms involved in those offenses. This has been done to ensure that no offenses in the Proposed Code are accidentally excluded in the transition from the current provisions. Subsection (a)(2) corresponds to § 1448(a)(2). Subsection (a)(3) corresponds to § 1448(a)(4). Subsection (a)(4) corresponds to § 1448(a)(5). Subsection (a)(5) corresponds to § 1448(a)(6). Note that the phrase "subject to" includes the fact that the order remains in effect and has not been vacated or otherwise terminated, so this does not need to be stated explicitly. Subsection (a)(6) corresponds to § 1448(a)(8), but simplifies the language. Note that § 1448(a)(9) has not been specifically included because all felony or misdemeanor drug offenses, regardless of what type of weapon is simultaneously possessed, are already covered by Subsections (a)(1)(A) and (a)(1)(C).

Section 5104(b) provides a limitation on the length of the prohibitions under Subsection (a), corresponding to 11 Del. C. § 1448(d).

Section 5104(c) grades the offense in Subsection (a). Subsection (c)(1) grades the offense as a Class 6 felony where the weapon is a destructive weapon, firearm or ammunition for a firearm corresponding to 11 Del. C. §§ 1448(c) and 1448(e)(1). The term "destructive weapon" has been incorporated into this grading provision from § 1448(e)(1). Note, however, that the grade adjustment for repeat offenders in § 1448(e)(1) has not been retained in this Subsection because all repeat offender grade adjustments are addressed by a general adjustment in Section 804 of the Proposed Code. Note also that the definition of "ammunition" has not been retained in this grading provision because the meaning of the term is clear on its face. Subsection (c)(2) grades the offense as a Class 8 felony in all other cases, corresponding to § 1448(c). Note that the grading scheme in Section 5105(c) generally does not incorporate § 1448(e)(2), which grades the offense in Subsection (a) as a Class 4 felony where the offender causes negligent injuring or death as a result of the violation. This result is covered in the proposed Sections for negligent homicide (Section 1104) and negligent injuring (Section 1203). In addition, the minimum sentencing provisions in § 1448(f)–(g) have not been retained in this Subsection for the reasons detailed above.

Section 5104(c)(3) provides for an upward grade adjustment where the offenses in this Section are committed within a Safe School or Recreation Zone. This provision takes into account the offense defined in 11 Del. C. § 1457, but treats it only as a grade adjustment for the offenses included in this Section, rather than as a separate office.

Section 5104(d) provides for the seizure and disposal of deadly weapons or ammunition possessed in violation of Subsection (a), corresponding to 11 Del. C. § 1448(a)(10).

Section 5105(e) lists defined terms referenced in the Section. These terms are defined in Section 5109. Reference the Commentary for Section 5109 for an explanation of how the defined terms relate to current Delaware law.

Provisions in 11 Del. C. § 1448(e)(3)–(4) Not Retained. The provisions in 11 Del. C. § 1448(e)(3)–(4), which establish sentencing rules, have not been incorporated into Section 5104 because they are redundant with similar, generally applicable procedural provisions found

elsewhere in the Proposed Code and in Delaware law. There is no need to restate those special provisions in this Section.

Comment on Section 5105. Providing Weapons to Disqualified Persons

Corresponding Current Provision(s): 11 Del. C. §§ 1445, 1454, 1455; 24 Del. C. §§ 903; *see also* 11 Del. C. § 1456 and 24 Del. C. §§ 902, 904, 904A

Comment:

Generally. Section 5105 establishes an offense prohibiting individuals from providing weapons to certain classes of people. This includes providing firearms to persons prohibited, providing sporting weapons to underage persons, and providing weapons under improper circumstances.

Relation to current Delaware law. Section 5105(a) defines the offense of providing weapons to prohibited persons, corresponding to the offense conduct in 11 Del. C. §§ 1445(2), 1445(4), 1454, 1455, and 24 Del. C. § 903. Some of the distinctions between these offenses are reserved for grading in Subsection (b), allowing the offense definition to be as broad as possible. By doing so, no blameworthy conduct related to the current offense provisions will be accidentally left out of the offense. But, note that Subsection (a)(2)(C) has been broadened to include giving any deadly weapon to a person known to be intoxicated, rather than just a self-defense weapon as provided in 24 Del. C. § 903.

Section 5105(b) defines the offense of providing B.B., air, or spear guns to children less than 16 years of age without parental consent, corresponding to 11 Del. C. § 1445(2).

Section 5105(c) grades the offense according to its variations. Subsection (c)(1) and (c)(4)(A) grade the offense under Subsections (a)(2)(A) and (a)(2)(D) as a Class 8 felony, corresponding to the grade in §§ 1454 and 1455, and corresponding to the maximum punishment allowed in § 1445(4), but assigning a different grade letter to reflect the new grading scheme. Note that, although Subsection (c)(1) retains the grades of the current offenses, it does not include the grade adjustment for repeat offenders in § 1455. This provision has not been retained because repeat offenses are governed by the proposed general grade adjustment for repeat offenders in Section 804.

Section 5105(c)(2)(A) grades the offense under Subsection (a)(2)(B) as a Class 8 felony, corresponding to the prohibition on the sale of firearms to underage persons in 11 Del. C. § 1445(4).

Section 5105(c)(2)(B) grades the offense under Subsection (a)(2)(B) as a Class B misdemeanor, corresponding to the prohibition on sale of self-defense weapons to underage persons in 24 Del. C. § 903.

Section 5105(c)(3) grades the offense under Subsection (a)(2)(C) as a Class B misdemeanor, corresponding to the prohibition on sale of self-defense weapons to intoxicated persons in 24 Del. C. § 903. Note that the purely regulatory provisions in the collection of provisions that make up the proposed offense under Section 5105(c)(2)(B) and (c)(3) from Title 24, including 24 Del. C. §§ 902, 904, and 904A, should remain in that regulatory title.

Section 5105(c)(4)(B) grades the offense under Subsection (a)(2)(D) as a Class B misdemeanor in all cases of deadly weapons not involving firearms. This does not correspond to

any provision of current law. Current law does not have a general offense for providing weapons other than firearms to persons who may be legally disqualified from ownership, outside of the provisions incorporated into Section 5104. But, even if weapons other than firearms are less dangerous than firearms, knowingly providing a deadly weapon to a disqualified person still creates a substantial risk of harm to the public. Rather than having no offense, this catchall is added at two grades lower than the grade for firearms in Subsection (c)(4)(A).

Section 5105(c)(5) grades the offense under Subsection (b) as a Class C misdemeanor, corresponding to the prohibition on sale of B.B., air, and spear guns to underage persons in 11 Del. C. § 1445(2). Note that 11 Del. C. § 1445(3), which prohibits a parent from allowing his or her child to have a firearm, B.B. gun, air gun, or spear gun without direct adult supervision, has not been retained because it is covered by reckless endangerment in proposed Section 1203.

Section 5105(d) lists defined terms referenced in the Section. These terms are defined in Section 5109. Reference the Commentary for Section 5109 for an explanation of how the defined terms relate to current Delaware law.

Permitting a Minor Access to a Firearm. Section 5105 does not incorporate 11 Del. C. § 1456 because it is redundant with other offenses in the Proposed Code. Because § 1456 requires that the minor actually obtain the firearm and use it to cause death or serious bodily injury, a firearm owner who meets the requirements of § 1456 through his or her reckless or negligent action in allowing the minor access to the weapon could also be charged under manslaughter in proposed Section 1103, negligent homicide in proposed Section 1104, or reckless or negligent injuring in proposed Section 1203, notwithstanding this specific offense. Moreover, the offenses in Sections 1103, 1104, and 1203 are lesser-included in each other, so there is still the opportunity for a defendant to plead down to a Class A misdemeanor, the grade currently assigned to conduct done in violation of § 1456.

Comment on Section 5106. Possessing a Firearm While Under the Influence of Drugs or Alcohol

Corresponding Current Provision(s): 11 Del. C. § 1460

Comment:

Generally. Section 5106 establishes an offense for possession of a firearm while chemically impaired.

Relation to current Delaware law. Section 5106(a) defines the offense of possessing a firearm while chemically impaired, corresponding closely to 11 Del. C. § 1460(a). The proposed offense definition used the phrase "chemically impaired" to describe the offender's condition, rather than "under the influence of alcohol or drugs" used in § 1460(a). Note that this change makes the definition of "under the influence of alcohol or drugs" in § 1460(b)(4) unnecessary.

Section 5106(b) provides a defense to prosecution under Subsection (a) where the firearm was inoperable for various reasons, corresponding to the affirmative defense provided in § 1460(a). Rather than defining "not readily operable" in a separate section, as in § 1460(b)(1), the proposed Section incorporates the definition into the defense definition itself.

Section 5106(c) grades the offense defined in Subsection (a) as a Class A misdemeanor, corresponding to the grade in § 1460(d). The proposed Section, however, does not include the

repeat offense grading provision provided in § 1460(d) because these situations are governed by the proposed general grade adjustment for repeat offenders in Section 804.

Section 5106(d) lists defined terms referenced in the Section. These terms are defined elsewhere, as noted in the text. Reference the Commentary to the applicable Section for an explanation of how the defined terms relate to current Delaware law.

11 Del. C. § 1460(c) Not Retained. Section 5106 does not include 11 Del. C. § 1460(c), which covers law enforcement investigatory authorization to take certain evidence from an individual believed to have violated § 1460. This provision would be more appropriately placed in a regulatory title dealing with weapons because it does not have any bearing on the liability of the offender and, as such, is not relevant to the offense itself.

Comment on Section 5107. Offenses Related to Background Checks for Firearm Sales

Corresponding Current Provision(s): 11 Del. C. §§ 1448A, 1448B,

Comment:

Generally. Section 5107 consolidates all current offenses related to background checks for firearms sales into one, comprehensive section. Specifically, this Section prohibits the sale of a firearm without conducting the required check and the misuse of criminal records by licensed firearms dealers, importers, or manufacturers.

Relation to current Delaware law. Section 5107(a) defines the offense of sale of a firearm without conducting the required check, corresponding to the offense conduct in 11 Del. C. §§ 1448A(h) and 1448B(e). Note that in the proposed offense definition, "person" includes any corporate entity, partnership, or individual. The meaning given to the term "person" is broad enough to encompass licensed dealers, importers, and manufacturers so these entities do not need to be explicitly enumerated in the text. Additionally, Section 5107 does not retain the grade adjustments in § 1448A and 1448B for subsequent violations because those adjustments are covered by the proposed general adjustment for repeat offenders in Section 804. Subsection (a)(3) provides that the criminal history background check need only comply with the regulatory requirements of [11 Del. C. §§ 1448A and 1448B]. This provision incorporates by reference all of the regulatory exceptions to when a background check is necessary, rather than including each exception within the text of the Code. Note that the sections referenced are in brackets because they will eventually be moved from where they currently are in Title 11 to a regulatory title and, accordingly, will have different citations.

Section 5107(b) defines the offense of misuse of criminal records by licensed firearms dealers, importers, and manufacturers, corresponding to 11 Del. C. § 1448A(f). Note that Section 5107(b) does not retain the portion of the offense in § 1448A covering unlawful disclosure of criminal history record information because that conduct is already covered by proposed Section 4304(a)(2) (unlawful use of information). The grade of the offense under Section 4304(a)(2) is consistent with the grade of the offense in § 1448A(f).

Section 5107(c) grades the offenses in the preceding Subsections. The proposed grades correspond directly to the current grades in 11 Del. C. §§ 1448A(f), 1448A(h), and 1448B(e).

Section 5107(d) lists a defined term referenced in the Section. This term is defined in Section 5109. Refer to the Commentary for Section 5109 for an explanation of how the defined terms relate to current Delaware law.

Provisions in 11 Del. C. §§ 1448A and 1448B Not Retained. A number of provisions in 11 Del. C. §§ 1448A and 1448B have not been retained in Section 5107. First, Section 5107 does not include the offense in § 1448A(g) of providing false statements or identification to subvert a background check. This offense is covered by the proposed theft by deception offense in Section 2103 because of the broad definitions of both "obtain" and "deception" in Section 2103. Although the grading scheme in Section 2101 increases the grade of the offense in § 1448A(g) to a Class 7 felony if the offender actually obtains the firearm, the attempt to obtain a firearm by fraudulent misidentification—governed by Section 701—would be graded lower as a Class 8 felony, which carries the same maximum punishment as authorized in § 1448A(g).

In addition, Section 5107 does not incorporate various regulatory provisions in §§ 1448A and 1448B, including §§ 1448A(c), (k), and (l), and 1448B(c) and (f). These important regulations govern when background checks are necessary, the procedures for conducting them, and what can or cannot be done with the information learned through a background check. These provisions should be preserved, but moved out of the criminal Code and into a regulatory title dealing with sales of firearms.

Finally, 11 Del. C. § 1448A(d), a bar to civil liability, should be retained with the other provisions to be moved to a regulatory title because it does not speak to criminal liability.

Comment on Section 5108. Grade Adjustment for Offenses Committed in a Safe School and Recreation Zone

Corresponding Current Provision(s): 11 Del. C. § 1457

Comment:

Generally. Section 5108 establishes a general grade adjustment applicable to a number of offenses in this Chapter, including: Section 5102, 5103, and 5104. This grade increase is triggered when the offenses under Section 5102, 5103, or 5104 are committed in a Safe School and Recreation Zone.

Relation to current Delaware law. Section 5108 is based upon 11 Del. C. § 1457, but transforms it from a provision that creates a unique offense and increases the maximum punishment allowed for certain underlying offenses, into a pure grade adjustment

Section 5108(a) defines the grade adjustment. Subsection (a)(1) is based upon the definition of a "Safe School and Recreation Zone" in 11 Del. C. § 1457(c), but simplifies the phrasing, removes redundant language, and separates the definition into its various elements, for easier reading and application. For example, Subsection (a)(1)(B) discusses the recreation centers, athletic fields, or stadiums covered in § 1457(c)(3), but removes the confusing language about private or public ownership because the crux of the provision is the use of the structure or property, not its ownership. The upper grade limited established in Subsection (a)(2), restricting applicability of Section 5108(a) to offenses graded as a Class 7 felony or lower, is based on the maximum grades of the offenses enumerated in § 1457(b). In restructuring the offense in § 1457 into a grade adjustment, it was necessary to include this upper limit to ensure that the grade aggravation would not apply to offenses with higher unadjusted grades than the Delaware General Assembly originally intended in enacting § 1457. The provision in Subsection (a)(2) helps preserve those policy judgments.

Section 5108(b) provides a defense to the application of the grade adjustment in Subsection (a). This defense corresponds to 11 Del. C. § 1457(g), but with some minor changes. First, the language in § 1457(g) about the defendant's burden of proof has been removed because the General Part deals generally with the burdens attached to all defenses. Second, the defense in § 1457(f) has not been retained because it only applies to the juvenile possession aspect of the offense, which this Proposed Code suggests should be moved to a regulatory title.

Section 5108(c) lists defined terms referenced in the offense definition. These terms are defined in Section 5109. Reference the Commentary to Section 5109 for an explanation of how the defined terms relate to current Delaware law.

Provisions in 11 Del. C. § 1457 Not Retained. Note that a number of subsections in 11 Del. C. § 1457, including § 1457(d), (e), and (h), have not been retained in Section 5108. First, § 1457(d), which explicitly allows prosecution for both the underlying offense and the hybrid offense in § 1457(a), is not included. By transforming § 1457 from a hybrid offense into a pure grade adjustment, there is no longer a need to specify whether prosecution for the underlying offense is limited. Under the proposed grade adjustment provision, there will only be one offense, so multiple prosecutions for the same underlying conduct is no longer an issue. Second, the "no defense for mistake of fact" provision in § 1457(e) is not included because the situation it addresses is governed by mistake principles in proposed Section 206 of the General Part. Third, § 1457(h), establishing non-application of the offense to law enforcement or security officers, is no longer necessary also as a result of § 1457 being transformed from a hybrid offense into a grade adjustment. Because the offenses to which proposed Section 5108 is applicable already provide for exceptions such as, "except as authorized by law," or defenses for having a license to concealed carry, those exceptions should cover any authorized possession of weapons by the persons excluded in § 1457(h) and a separate provision would be superfluous. Finally, any language in § 1457 regarding juvenile possession of weapons is not included because the only authorized penalty for those offenses is mandatory expulsion from school. Delaware's Criminal Code need not get entangled in the policies of schools and these provisions should instead be transferred to a regulatory title dealing with schools and education.

Comment on Section 5109. Definitions

Corresponding Current Provision(s): 11 Del. C. §§ 222, 1444, 1448; 24 Del. C. § 901

Comment:

Generally. This section collects all defined terms used in Chapter 5100.

Relation to current Delaware law. Section 5109(a) defines "dangerous instrument," corresponding to the current definition in 11 Del. C. § 222(4). As in current law, the definition includes "disabling sprays" (formerly "disabling *chemical* sprays), but the term is not defined. Instead, the term is given a single, commonly-understood example in the text—pepper spray—to avoid having to construe a highly technical definition. Yet, the term should be interpreted to include everything in the current definition in 11 Del. C. § 222(7): "mace, tear gas, pepper spray or any other mixture containing quantities thereof, or any other aerosol spray or any liquid, gaseous or solid substance capable of producing temporary physical discomfort, disability or injury through being vaporized or otherwise dispersed in the air, or any cannister [sic], container

or device designed or intended to carry, store or disperse such aerosol spray or such gas or solid."

Section 5109(b) defines "deadly weapon," corresponding to the current definition in 11 Del. C. § 222(5). The proposed structure of the definition helpfully clarifies that the "us[ed] to cause death or serious physical injury" requirement only applies to dangerous instruments in Subsection (b)(2), not the inherently deadly weapons enumerated in Subsection (b)(1).[20] Note that Subsection (b)(1) includes the definition of an "ordinary pocket knife" directly in the text to avoid having an additional defined term.

Section 5109(c) defines a "deadly weapon designed for the defense of one's person," corresponding to the description of deadly weapons made especially for the defense of one's person in 24 Del. C. § 901.

Section 5109(d) defines "destructive weapon," corresponding to the current description of the term in 11 Del. C. § 1444(a) and (c). Section 5109(d) separates the definition into its various elements for easier reading and application. Note that even though the definition of "destructive weapon" in Subsection (d)(1) include "bomb or bomb shell," the offenses in this Chapter do not conflict with proposed Section 2303 because, unlike proposed Section 2303, here there is no "intent to cause injury" requirement associated with the use of a "bomb or bomb shell."

Section 5109(e) defines "firearm," corresponding to the current definition in 11 Del. C. § 222(12).

Section 5109(f) defines "handgun," corresponding to the current definition in 11 Del. C. § 1448(5).

[20] *See Robinson v. State*, 984 A.2d 1198 (Del. 2009) (holding that, to convict the defendant of possession of a deadly weapon by a person prohibited under 11 Del. C. § 1448(a), the State did not need to prove that the defendant used or attempted to use a steak knife to cause death or serious physical injury because the steak knife was inherently a "dangerous weapon").

CHAPTER 5200. DRUG AND RELATED OFFENSES

Section 5201. Possession of Controlled and Noncontrolled Substances
Section 5202. Manufacture or Delivery of Controlled and Noncontrolled Substances
Section 5203. Aggravating Factors Providing Grade Increase for Offenses in Sections 5201–02
Section 5204. Drug Paraphernalia Offenses
Section 5205. Prescription Drug Registrant Offenses
Section 5206. Unlawful Possession of a Prescription Form
Section 5207. Internet Pharmacy Offenses
Section 5208. Immunity in Life-Threatening Emergency
Section 5209. Court Having Jurisdiction
Section 5210. Definitions

General Comment on Chapter 5200:

Corresponding Current Provision(s): 11 Del. C. §§ 627, 1115–27; 16 Del. C. §§ 4765, 4740, 4919A, 4798, 4767, 4768, 4769; 21 Del. C. §§ 4177, 4177M, 2613

Comment:

Generally. Note that Chapter 5200 is built out of material from regulatory titles of the Delaware Code. As a result, a number of current provisions that may have been included in Chapter 5200 have not been included, for various reasons. This Comment explains each of those choices.

Provisions Not Included. A number of current provisions have not been included in this Chapter or anywhere else in Delaware's Code because they are unnecessary for various reasons:

16 Del. C. § 4765, which provides for the preservation of civil and administrative remedies, is unnecessary because proposed Section 104 of the General Part generally preserves those remedies.

16 Del. C. § 4740(g), which covers the failure to maintain records required by law, is unnecessary because proposed Section 3203 [Tampering With Public Records] covers this conduct.

16 Del. C. § 4919A(s) covers a variety of conduct that is already covered by other offenses in the Code: selling marijuana to an individual not permitted by the medicine marijuana laws is covered by proposed Section 5201(b)(2) [Delivering a Controlled Substance], failing to maintain records if covered by proposed Section 3203 [Tampering with Public Records], and fraudulent maintenance of records is covered by proposed Section 2202 [Fraudulent Tampering with Public Records].

16 Del. C. § 4919A(v), which covers the fraudulent representation to a law-enforcement officer of any circumstances relating to the medical use of marijuana to avoid arrest or prosecution, is unnecessary because proposed Section 3301(a)(2)(A) [Obstruction of Justice] covers virtually identical conduct.

16 Del. C. § 4798(r), which covers knowing disclosure of prescription monitoring information, is unnecessary because proposed Section 4304(a) [Unlawful Disclosure of Confidential Information] already covers this conduct.

16 Del. C. § 4798(s) is unnecessary because, if an individual uses information to further his own crime, or the crime of another, he will be liable either under attempt, complicity, or conspiracy for the underlying offense.

16 Del. C. 4798(t), which covers the fraudulent obtaining of prescription monitoring information, is unnecessary, because the conduct is already covered by either proposed Section 4305 [Unlawful Access to Information], or, to the extent it amounts to a different kind fraud, proposed Section 2103 [Theft by Deception].

Finally, 11 Del. C. § 627, a drug offense based on "huffing," has not been retained because it is incompatible with the highly specialized, highly regulated field Chapter 5200 operates within. To the extent that the drugs contemplated in 11 Del. C. § 627 are controlled substances, the offense conduct is covered by proposed Sections 5201 and 5202.

Provisions Retained in Other Chapters or Regulatory Titles. A number of current provisions have not been included in this Chapter because they should either remain in separate regulatory titles or be moved to other parts of the Code. 11 Del. C. §§ 1115–27 define a number of offenses related to sale of tobacco, as well as regulations aimed at discouraging such sales. These offenses are graded at most as violations, which may only be punished by a fine. Given the low levels of punishment and regulatory nature of these Sections, they ought to be relocated to another Title of the Delaware Code dealing with tobacco regulation. 16 Del. C. § 4767, which covers first offenders controlled substances diversion programs, should remain in a regulatory title or be incorporated into Chapter 500 as a non-exculpatory defense. 16 Del. C. § 4768, which covers the ability of the court to order a defendant to submit to a medical or psychiatric examination or treatment, should remain in a regulatory title. 21 Del. C. § 4177, which establishes a DUI offense, is variously covered by the assault, reckless endangerment, and homicide offenses (when read in conjunction with the reckless culpability read-in provision in Section 205(d)), or by proposed Section 1205 [Operating a Vehicle While Chemically Impaired]. Finally, any minor, specialized regulatory offenses should remain in their regulatory titles, including, but not limited to, 21 Del. C. §§ 2613 and 4177M. These minor offenses are really just regulatory enforcement and are best kept within their respective provisions.

Comment on Section 5201. Possession of Controlled and Noncontrolled Substances

Corresponding Current Provision(s): 16 Del. C. §§ 4752, 4755, 4756, 4763, 4764, 4761, 4751D ; *see also* 16 Del. C. §§ 4762, 4766, 4751B

Comment:

Generally. Section 5201 establishes an offense prohibiting the possession of controlled and noncontrolled substances, by consolidating a number of separate offenses present in current Delaware law. This offense includes such sub-offenses as: possession of a controlled substance, possession of marijuana, and unlawful possession of noncontrolled prescription drugs. Section 5201 also includes upward grade adjustments where aggravating factors are present.

Relation to current Delaware law. Section 5201(a) defines the offense of possession of a controlled substance, consolidating the most basic offense definitions from 16 Del. C. §§ 4752-56, and 4763. Note that the various grading distinctions in the current offense definitions are reserved for Section 5201(d), where all grading is addressed. The "except as authorized by law"

provision in Subsection (a) is meant to incorporate the portions of § 4763 that exempt certain persons from prosecution. Because the remaining provisions § 4763, specifying which categories of persons, are exempt are regulatory in nature, they should remain where they are currently in Title 16. But, that portion of § 4763 should be reworded into an authorization, rather than an exception to liability, which is consistent with § 4763(a)(3)'s catch-all for other authorizations.

The "as provided in Subsection (b)" provision in Subsection (a) preserves the parenthetical from § 4763(a) and is intended to make it clear that a prosecution under Subsection (b) for simple possession of marijuana precludes prosecution under Subsection (a) for more serious drug possession. Note that this new structure, together with the consolidation of multiple current offenses under Section 5201 generally, makes the explicit provision for lesser-included offenses in 16 Del. C. § 4766 unnecessary. The general principles covering lesser-included offenses in proposed Section 211 governs all such situations. Finally, note that the "knowing" culpability required in Subsection (a)(1), although present in the current simple marijuana possession offense, is not present in the current offenses that make up the offense defined in Subsection (a). This minimum culpability requirement has been added to justify the potentially very high liability an individual could face if convicted under Subsection (a).

Note that 11 Del. C. § 4762, making it an offense to provide a hypodermic syringe or needle to another person except in proper medical circumstances, is covered by the interaction between proposed Sections 5201(a) and 211 (accomplice liability). A person who aids another person to use a controlled substance in violation of Section 5201 by providing a hypodermic syringe under the terms of Section 211 would be equally liable for the drug offense.

Section 5201(b) defines the offense of possession of marijuana, consolidating the offenses defined in 16 Del. C. § 4764(a)-(b). Note that the provisions in § 4764(c)-(i) have not been included in Section 5201(b) or elsewhere in this Chapter, because they are purely regulatory and, as such, do not belong in the Criminal Code. Specifically, the offense conduct in § 4764(c)-(d) has not been included in the offense definition in Subsection (b) and should instead remain in Title 16 because it is punished solely by civil fines. Additionally, the phrase "except as authorized by law" in Subsection (b) maintains current law's exception from liability for medical marijuana possessed under a valid prescription.

Section 5201(c) defines the offense of unlawful possession of noncontrolled prescription drugs, consolidating the offenses defined in 16 Del. C. § 4761(a), (c), and (d). The grading distinctions in the current offense definitions are reserved for Section 5201(d), where all grading is addressed, including the application of the grade adjustment for an aggravating factor. The phrase "possesses *for personal use*" excludes common-sense situations not contemplated by the General Assembly to be an offense, but more simply than the current affirmative defenses in § 4761(e). Note that there are a number of provisions in § 4761 that have not been incorporated into Subsection (c) because they either are unnecessary, or are purely regulatory and should remain in Title 16. First, § 4761(f), which provides special evidentiary rules, is unnecessary because general evidentiary rules are sufficiently broad and flexible to ensure proper outcomes, and judges do not need special guidance with respect to these particular offenses. Additionally, § 4761(a)(2), which establishes specific exceptions from criminal liability for possession without a prescription, should remain in Title 16. But, to fit together with the proposed offense definition in Section 5201(c), which only prohibits the possession of noncontrolled drugs for which a prescription is "required by law," the exceptions should be reworked into affirmative authorizations for possession without a prescription.

Section 5201(d) grades the offenses in the preceding Subsections. Subsection (d)(1) provides the grades for an offense under Subsection (a), corresponding directly to the current grades in 16 Del. C. §§ 4752-56. Subsections (d)(1)(B) and (d)(1)(D) include the exceptions for prescription drugs found in current law. Subsection (d)(1)(F), establishing a default grade for all other cases under Subsection (a), corresponds to the current grade in 16 Del. C. § 4763(b). This grade applies to offenses involving controlled substances in quantities less than Tier 1, and offenses involving counterfeit controlled substances. Subsection (d)(2) provides the grade for an offense under Subsection (b), taking into account the current grading scheme in 16 Del. C. § 4764. Currently, § 4764 grades a baseline marijuana possession offense as an "unclassified misdemeanor." Current § 4764 goes on to authorize a maximum sentence of three months for the version of the offense upon which proposed Subsection (b)(1) is based, but does not specify the maximum punishment authorized for the versions of the offense upon which proposed Subsection (b)(2) is based. Yet, § 4764 elevates both versions of the offense to Class B misdemeanors if an aggravating factor is present. To reconcile this discrepancy, Subsection (d)(2) grades both versions of the offense in Subsection (b) as a Class C misdemeanor. Subsection (d)(3) provides the grade for an offense under Subsection (c), taking into account the current grading scheme in 16 Del. C. § 4761(a). Currently, § 4761(a) grades simple noncontrolled substances possession as an "unclassified misdemeanor" and the aggravated form as a Class B misdemeanor. Because the proposed grading scheme does not include the "unclassified misdemeanor" grade, to make this aggravation work under the proposed scheme, it was necessary either to raise the grade of simple possession to a Class C misdemeanor, or to lower the grade of aggravated possession to a Class C misdemeanor. The latter option has been adopted in light of the fact that the drugs involved in this offense are noncontrolled substances and presumably less severe than those involved in other offenses under Section 5201.

Section 5201(d)(4) establishes upward grade adjustments for certain offenses if aggravating factors under proposed Section 5203 are present. Subsection (d)(4)(A) permits an upward grade adjustment of up to two grades for certain offenses under Subsection (a) if aggravating factors are present, one grade per factor. This provision accomplishes a similar effect to the grade aggravations in the underlying current offenses, but is also different in some important ways. In the current underlying offenses, up to two factors can cause an upward adjustment in grade, and the highest available grade for aggravation is a Class 4 felony. But, the current law allows the first aggravating factor to increase the grade of the offense by *two* grades, and the second aggravating factor adds a third grade. The two-grade increase for one aggravating factor has not been retained in Subsection (d)(4)(A); instead, Subsection (d)(4)(A) takes a "one grade per factor" approach. This approach is desirable for two reasons. First, it is consistent with the grade aggravation approach for the manufacture/dealing offense, which is treated in all other respects as more serious than mere possession. Second, it is consistent with the practice throughout the Proposed Code and current Delaware law, which nearly always equates one aggravating factor with a single grade increase. Because every grade increase doubles the available maximum punishment, the proposed grading scheme is designed so that a single increase in grade always represents a significant, but incremental increase in available punishment. The threat of doubled punishment should be a sufficient incentive for an offender against making her crime worse through the commission of aggravating factors. Subsection (d)(4)(B) permits an upward grade adjustment of one grade for certain offenses under Subsections (a)-(c) if an aggravating factor is present. This provision, coupled with the limitation on raising the penalty above a Class 4 felony, accomplishes the precise effect that the underlying

current offenses do. The only underlying offense that is not currently subject to aggravation is 16 Del. C. § 4758 (unlawful dealing in counterfeit or purported controlled substance). Yet, for consistency, the aggravation in proposed Subsection (d)(4)(B) has been extended to cover that offense as well.

Note that the grade adjustment provision in Section 5201(d)(4) does not include an adjustment based on 16 Del. C. § 4751B for prior felony drug convictions. The Proposed Code deals with all repeat offender grade adjustments in Section 804 of the General Part, so this basis for aggravation has not been incorporated in Subsection (d)(4).

Section 5201(d)(5) provides that knowledge of weight or quantity of a substance is not an element of the offense, incorporating salient portions of 16 Del. C. § 4751D(a) that apply to the proposed structure of the offenses in this Chapter. The remaining provisions in § 4751D are evidentiary in nature and should remain in Title 16.

Section 5201(e) lists defined terms referenced in Section 5201. The terms in Subsections (f)(1) and (f)(3) are defined in Section 5110. See the Commentary to Section 5110 for an explanation of how the defined terms relate to current Delaware law. The remaining terms listed are defined outside of the Criminal Code in Title 16.

Comment on Section 5202. Manufacture and Delivery of Controlled and Noncontrolled Substances

Corresponding Current Provision(s): 16 Del. C. §§ 4752, 4753, 4754 4755, 4756, 4758, 4759, 4761, 4751D; *see also* 16 Del. C. § 4760, 4760A

Comment:

Generally. Section 5202 establishes an offense prohibiting the manufacture and delivery of controlled and noncontrolled substances, by consolidating a number of separate offenses present in current Delaware law. This offense includes such sub-offenses as: manufacture or delivery of a controlled substance, and unlawful delivery of noncontrolled prescription drugs. Section 5202 also includes upward grade adjustments where aggravating factors are present and defenses to liability for offenses under the Section.

Relation to current Delaware law. Section 5202(a) defines the offense of manufacture or delivery of a controlled substance, consolidating the most basic offense definitions from 16 Del. C. §§ 4752-56 and 4758–59. The various grading distinctions in the current offense definitions are reserved for Subsection (c) of proposed Section 5202, where all grading is addressed. Note that the offense definition in Section 5202(a), plus accomplice liability in Section 211 and attempt liability in Section 701, work together to make 16 Del. C. §§ 4760 and 4760A unnecessary. Current § 4760 is unnecessary because, if a person intentionally aids another by providing a property for the activities prohibited under Section 5202(a), that person is an accomplice and can be liable for the underlying offense. Accomplice liability may even, in some cases, result in greater liability than that provided under § 4760. Similarly, the offense definition in § 4760A is unnecessary because it describes conduct that amounts to attempt or complicity liability for manufacturing a controlled substance. Note also that the "possesses with intent to manufacture" language in the current offense definitions has not been retained in the proposed offense definition in Subsection (a)(3). This is because the situation contemplated by the current language is factually impossible; if something has not yet been manufactured, it cannot presently

be possessed. But, to the extent the current offense definitions are trying use this language to capture possession of precursor materials with intent to manufacture them into a controlled substance, that situation would be akin to attempted manufacture and be governed by Section 701 [Attempt] coupled with the underlying offense in Section 5202(a).

Section 5202(b) defines the offense of unlawful delivery of noncontrolled prescription drugs, consolidating the offense definitions in 16 Del. C. §§ 4761(a), (c), and (d). The various grading distinctions in the current offense definitions are reserved for Section 5202(c), where all grading is addressed, including application of the grade adjustments for an aggravating factor. Note that there are a number of provisions in § 4761 that have not been incorporated into Subsection (b) because they either are unnecessary, or are purely regulatory and should remain in Title 16. First, § 4761(f), which provides special evidentiary rules, is unnecessary because general evidentiary rules are sufficiently broad and flexible to ensure proper outcomes, and judges do not need special guidance with respect to these particular offenses. Second, § 4761(a)(2), which establishes specific exceptions to criminal liability for possession without a prescription, should remain in Title 16, but be reworked into an affirmative authorization, rather than list of individual exceptions. But, to fit together with the proposed offense definition in Section 5202(b), which only prohibits the possession of noncontrolled drugs for which a prescription is "required by law," the exceptions should be reworked into affirmative authorizations for possession without a prescription.

Section 5202(c) grades the offenses in Subsections (a) and (b). Subsection (c)(1) provides the grades for various levels of an offense under Subsection (a), corresponding to the grades in 16 Del. C. §§ 4752-56 and 4758. Yet, Subsection (c)(1) creates a grading distinction between completed delivery and manufacture, and possession with intent to deliver. Possession with intent to deliver is a specially codified form of attempt liability. Its centrality to modern drug enforcement makes it indispensible to this Section. But the grade of possession with intent has been set at one grade lower than the offense would be if completed. This maintains consistency with the way attempts are graded for all other offenses is the Proposed Code. *See* proposed Section 707 and corresponding Commentary. The default grade in Subsection (c)(1)(B)(iv) (increased by one grade under Subsection (c)(1)(A)) covers offenses under Subsection (a) involving counterfeit or purported controlled substances. Subsection (c)(2) provides the grades for an offense under Subsection (b). The grade for completed delivery has been lowered to a Class A misdemeanor from the current grade of a Class G felony in 16 Del. C. § 4761(c) to reflect the changes in the proposed grading scheme. The grade was not changed to a Class 8 felony—its corresponding punishment level in the proposed grading scheme—because that would have allowed an aggravating factor to increase the punishment beyond what was intended in the current code. Note also that Subsection (c)(2)(B) sets the grade of possession with intent to deliver at one grade lower than the completed offense, for the same reasons given above.

Section 5202(c)(3) establishes an upward grade adjustment of one grade for the offenses in Section 5202 if an aggravating factor under Section 5203 is present. This provision, coupled with the limitation on raising the penalty above a Class 4 felony, accomplishes the precise effect of the underlying current offense grades. The only underlying offense that is not currently subject to aggravation is 16 Del. C. § 4758 (unlawful dealing in counterfeit or purported controlled substance). Yet, for consistency, the aggravation in Subsection (c)(3) has been extended to cover that offense as well. Note that the grade adjustment provision in Subsection (c)(3) does not include an adjustment based on 16 Del. C. § 4751B for prior felony drug

convictions. The Proposed Code deals with all repeat offender grade adjustments in Section 804 of the General Part, so this basis for aggravation has not been incorporated in Subsection (d)(4)

Section 5202(c)(4) provides that knowledge of weight or quantity of a substance is not an element of the offense, incorporating salient portions of 16 Del. C. § 4751D(a) that apply to the proposed structure of the offenses in this Chapter. The remaining provisions in § 4751D are evidentiary in nature and should remain in Title 16.

Section 5202(d) provides a defense to criminal liability for an offense under Subsection (b), corresponding directly to 16 Del. C. § 4761(e).

Section 5202(e) requires remediation and cleanup costs to be paid by any person convicted under Subsection (a)(1), corresponding to 16 Del. C. § 4760A(b). Subsection (e) has simplified the language in § 4760A(b) and separated it into its elements for easier reading. Subsection (e) has also substituted the language about manufacture for language regarding "clandestine laboratories." Also unlike § 4760A(b), Subsection (e) does not define "cleanup" or "remediation" because their meanings are apparent. Finally, the requirement in Subsection (e) that the costs be "reasonable" is a valuable addition to the provisions because it will provide a flexible standard to determine which costs a defendant should cover.

Section 5202(f) lists defined terms referenced in Section 5202. The terms in Subsections (f)(1) and (3) are defined in Section 5110. See the Commentary to Section 5110 for an explanation of how the defined terms relate to current Delaware law. The terms in Subsections (f)(2) and (4)-(6) are defined outside of the Criminal Code in Title 16.

Comment on Section 5203. Aggravating Factors for Grade Adjustments in Sections 5201–02

Corresponding Current Provision(s): 16 Del. C. § 4751A

Comment:

Generally. Section 5203 establishes the aggravating factors applicable to the grade adjustments for all underlying offenses in Sections 5201-02.

Relation to current Delaware law. Section 5203(a) lists the four exclusive aggravating factors for grade adjustments in Sections 5201-02. Subsection (a)(1) combines the two factors currently in 16 Del. C. § 4751A(1)a. and b. By combining these two into a single factor, the provision in § 4751A(2) is rendered unnecessary because, no matter what the State may prove about the offense, it would still only add up to one factor. For example, if the offense was committed within 300 feet of both a school and a church, there would still only be one aggravating factor under the proposed scheme in Subsection (a)(1). Subsection (a)(1) also incorporates and simplifies the definitions from 16 Del. C. § 4701(41) and (42) for "protected park" and "protected school." Note that all references to ownership of the "park or recreation area, including parkland" in the current definition have not been retained in Subsection (a)(1)(B) because the crux of the factor is what the land is used for (i.e., children's recreation), not who owns it. Furthermore, the language about ownership makes the definition difficult to understand. Note also that Subsection (a)(1) incorporates a "private places" exception into the aggravating factor, rather than using the structure in 16 Del. C. § 4701(41) and (42), which enumerates each of the specific "areas accessible to the public" that are covered under the aggravating factor. This change makes it unnecessary to include the language about "parked vehicles" from § 4701(41)b.

in proposed Subsection (a)(1). A parked vehicle would clearly not be considered a "private place" subject to the exception in Subsection (a)(1) because it would be unreasonable for anyone to expect to be free of surveillance while in a parked car on a public road.

Section 5203(a)(2) lists another aggravating factor, corresponding to 16 Del. C. § 4751A(1)c. Note that the word "vehicle" in § 4751A(1)c. has been changed to "motor vehicle" in proposed Subsection (a)(2) for consistency with definitions that are already being used in the Proposed Code. Because "vehicle" has been used to mean more than automobiles elsewhere in the Code, it is necessary to be more specific when referencing automobiles only.

Section 5203(a)(3) lists another aggravating factor, corresponding to 16 Del. C. § 4751A(1)d., but separating into its elements for easier reading and application.

Note that Section 5203(a) omits a final aggravating factor, corresponding to 16 Del. C. § 4751A(1)e., for resisting arrest by means of force, or fleeing from an officer and recklessly endangering other persons by fleeing from a law enforcement officer in a vehicle. This factor has been omitted because it describes offense conduct that may be separately charged as one or more other offenses under either proposed Section 3302(b)(2), or Sections 3302 and 1203(b)(2)(A).

Section 5203(b) lists defined terms referenced in the aggravating factors. The terms in Subsections (b)(1)-(3) are defined in Section 5110. Reference the Commentary to Section 5110 for an explanation of how the defined terms relate to current Delaware law. The terms in Subsections (b)(4), (5), and (7) are defined elsewhere in the Proposed Code. Reference the Commentary to those Sections for an explanation of how the defined terms relate to current Delaware law. Finally, the defined term in Subsection (b)(6) is defined outside of the Criminal Code in Title 9.

Comment on Section 5204. Drug Paraphernalia Offenses

Corresponding Current Provision(s): 16 Del. C. §§ 4771, 4772, 4773, 4774

Comment:

Generally. Section 5204 combines a number of offenses in current law related to drug paraphernalia, including: the use, manufacture and sale, and advertising of drug paraphernalia.

Relation to current Delaware law. Section 5204(a) defines the offense for use of drug paraphernalia, corresponding to 16 Del. C. §§ 4771(a) and 4774(a). The addition of the "except as authorized by law" language to the offense definition covers the exemptions in 16 Del. C. § 4773(1) where a person is authorized by law to possess items of drug paraphernalia. The phrase, "or as provided in 16 Del. C. § 4774(b)" is included because that subsection describes a civil penalty for possession of drug paraphernalia related to a personal use quantity. That provision is not an authorization for possession, but would prohibit parallel criminal proceedings for the same paraphernalia.

Section 5204(b) defines the offense for manufacture and sale of drug paraphernalia, corresponding to 16 Del. C. §§ 4771(b) and 4774(c)-(d), but separates the offense definition into its elements. Note that Subsection (b) also covers the offense language in 16 Del.C § 4757(c) because it is redundant with the other offenses. Accordingly, § 4757(c) should be removed from Title 16. As in Subsection (a), the addition of the "except as authorized by law" language to the offense definition covers the exemptions in 16 Del. C. § 4773(1) where a person is authorized by law to manufacture or distribute items of drug paraphernalia. Subsection (b)(2) provides that an

offender must be reckless as to whether the item will be used as drug paraphernalia in violation of Subsection (a). This provision is different from current law. First, the "knowing or under circumstances where one reasonably should know" culpability requirement in § 4771(b) has been replaced with the "reckless" culpability requirement. The current language appears to describe negligence, which is too slight a culpability level to support the level of punishment invoked by this non-violent offense. Assuming that a "negligence" culpability level was not the General Assembly's intent—given that the word "negligence" never actually appears in the text—but taking into account that the language itself clearly intends to soften the culpability requirement of "knowing," it is most appropriate to use a "reckless" culpability requirement instead. Second, the list of possible uses of the paraphernalia (e.g., "used to plant, propagate, cultivate, etc.") in § 4771(b) has been removed because it is redundant of the definition of "drug paraphernalia." The reader is able to cross-reference the provision here with the extensive definition of "drug paraphernalia" in Title 16, so it is unnecessary to include language from the definition in Subsection (b)(2).

Section 5204(c) defines the offense for advertising drug paraphernalia, corresponding to 16 Del. C. § 4774(e). Subsection (c)(2) provides that an offender must be reckless as to whether the advertisement is intended to promoted the sale of drug paraphernalia. As in Subsection (b)(2) above, the "knowing or under circumstances where one reasonably should know" culpability requirement currently in § 4774(e) has been replaced with a "reckless" culpability requirement in this Subsection. The current language appears to describe negligence, which is too slight a culpability level to support the level of punishment invoked by this non-violent offense. Assuming that a "negligence" culpability level was not the General Assembly's intent—given that the word "negligence" never actually appears in the text—but taking into account that the language itself clearly intends to soften the culpability requirement of "knowing," it is most appropriate to use a "reckless" culpability requirement instead.

Section 5204(d) establishes that a person may not be charged under both Section 5201(b) and Section 5204(a) for possession of drug paraphernalia pertaining to the use of marijuana. This corresponds to 16 Del. C. § 4771(a), preserving the exception in the second sentence of that provision. Insofar as the exception in § 4771(a) applies to the civil penalties for marijuana possession that have not been relocated to the Proposed Code, however, the language of § 4771(a) must be preserved in Title 16.

Section 5204(e) grades the offenses in Subsections (a)-(c). Generally, the grades reflect the same penalties established in 16 Del. C. §§ 4771 and 4774, but have been translated to fit within the proposed grading scheme. However, the grades in Subsection (e)(2) have been set at one grade lower than current law provides for the same conduct. The legislation authorizing this Proposed Code mandates that "disproportionate" statutes be identified and rectified. The proportionality of an offense's authorized punishment is directly tied to the grade assigned to that offense. An offense's grade could be either disproportionately high *or* low. The nonpartisan consultative group supervising the drafting process for this Proposed Code has scrutinized the relative grading of all offenses, and has decided that this offense's grade is disproportionately high when compared to other offenses of the same grade in current law. The grade of this offense has been changed to reflect that judgment. Subsection (e)(4) corresponds to the grading provision in 16 Del. C. § 4774(d) specifically, but separates it into its elements for easier reading and application. Note that Subsection (e)(2)(A) sets the grade of possession with intent to deliver drug paraphernalia at one grade lower than the completed offense, for the reasons given above. *See* the Commentary to proposed Section 5202(c)(2).

Section 5204(f) lists defined terms referenced in Section 5204. The terms in Subsections (f)(1) and (2) are defined in Section 5110. See the Commentary to Section 5110 for an explanation of how the defined terms relate to current Delaware law. The term in Subsection (f)(3) is defined outside of the Criminal Code in Title 16.

Factors for Determination Not Included. Section 5204 does not include 16 Del. C. § 4772, which sets forth a non-exclusive list of factors a court should consider in determining whether an object is drug paraphernalia. It is unnecessary to list any factors for the Court in this provision because judges have the Delaware Uniform Rules of Evidence, logic, and experience to guide them, in addition to a very specific definition of "drug paraphernalia" in Title 16.

Comment on Section 5205. Prescription Drug Registrant Offenses

Corresponding Current Provision(s): 16 Del. C. §§ 4739, 4757, 4759

Comment:

Generally. Section 5205 combines current Delaware offenses related to prescription drug registrants: unlawfully distributing prescription drugs, and administering performance-enhancing steroids

Relation to current Delaware law. Section 5205(a) defines the offense of unlawfully distributing prescription drugs, corresponding to 16 Del. C. § 4759(a)(1) and incorporating the necessary features of the prohibitions found in 16 Del. C. § 4739. The "except as authorized by law" provision in Subsection (a) covers the exceptions and authorizations of certain behavior found throughout § 4739. The offense definition in Subsection (a)(3) adds a "knowing" culpability requirement that is present in other, similar offenses in the current statute. *See* 16 Del. C. § 4757(a)(1). Note that Subsection (a)(5) specifically corresponds to the portion of § 4759(a)(2) dealing with distribution and dispensing of prescription drugs.

Section 5205(b) defines the offense of administering performance enhancing steroids, corresponding to 16 Del. C. § 4757(a)(7), but separating it into its elements for easier reading and application.

Note that the offenses in Subsections (a)–(b), coupled with the inchoate offense of solicitation in Section 702, covers the conduct defined in 16 Del.C § 4757(c). Accordingly, § 4757(c) should be removed from Title 16.

Section 5205(c) grades the offenses in Subsections (a)–(b) corresponding to the current grades in 16 Del. C. §§ 4757(b) and 4759(b).

Section 5205(d) lists defined terms referenced in Section 5205. The terms in Subsections (d)(2) and (5) are defined in Section 5110. Reference the Commentary to Section 5110 for an explanation of how the defined terms relate to current Delaware law. The term in Subsection (c)(3) is defined elsewhere in the Proposed Code. Reference the Commentary to the applicable Section for an explanation of how the defined term relates to current Delaware law. The terms in Subsections (c)(1), (4), and (6) are defined outside of the Criminal Code in Title 16.

Provisions in 16 Del. C. § 4757 Not Retained. A number of provisions in 16 Del. C. § 4757 have not been included in Section 5205, for various reasons. First, § 4757(a)(2) has not been retained because it is redundant with other offenses in the Proposed Code. Because registrations to deal in prescription drugs are issued biannually by the appropriate agency, the use of a "fictitious, revoked, suspended, or expired" registration number, or one given to another

person, could constitute a number of other offenses, including: Forgery/Counterfeiting under proposed Section 2201, Theft by Deception under proposed Section 2103, Tampering with Public Records under proposed Section 3203, Fraudulent Tampering with Public Records under proposed Section 2202, or, even Obstruction of the Administration of Justice under proposed Section 3304, if done directly to a law enforcement body.

Second, 16 Del. C. § 4757(a)(3), which covers the acquisition or attempt to obtain possession of a controlled substance or prescription drug by "misrepresentation, fraud, forgery, deception, or subterfuge," has not been retained because it is redundant with other offenses in the Proposed Code. Current § 4757(a)(3) essentially amounts to a basic fraud or forgery offense. Various frauds are already covered under Section 2103 [Theft by Deception] and forgery is covered under Section 2201.

Third, 16 Del. C. § 4757(a)(4), which covers the provision of false or fraudulent material information or the omission of material information from any required application, report, record, or document, has not been retained because it is redundant with other offenses in the Proposed Code. The conduct defined in § 4757(a)(4) is virtually identical to that in proposed Section 3203 [Tampering with Public Records] or, if done with intent to defraud, to proposed Section 2202 [Fraudulent Tampering with Public Records].

Fourth, 16 Del. C. § 4757(a)(5), which covers the manufacture, distribution, or possession of any device designed to reproduce a "trademark, trade name, or other identifying mark," onto any drug, drug container, or label so as to render the drug a counterfeit, has not been retained because it is redundant with other offenses in the Proposed Code. The conduct defined in § 4757(a)(5) amounts to trademark counterfeiting, which is covered in proposed Section 2201 [Forgery and Counterfeiting].

Fifth, 16 Del. C. § 4757(a)(6), which covers the acquisition or attempt to obtain possession of a controlled substance by theft, has not been retained because it is redundant with any of the consolidated offenses treated as "theft" in proposed Section 2102-07.

Finally, § 4757(c), which covers the solicitation of multiple prescription drug crimes, has not been retained because it amounts to a repeat offender grade adjustment. [The situations provided in § 4757(c) are covered by the general grade adjustment in Section 804 of the Proposed Code.]

Provisions in 16 Del. C. § 4759 Not Retained. A number of provisions in 16 Del. C. § 4759 have not been included in Section 5205 for various reasons. First, § 4759(a)(3), which covers the refusal or failure to make, keep, or furnish any record required by law, has not been retained. Because § 4759(a)(3) involved the violation of a duty specified by law, it is covered by proposed Section 3304 [Obstructing the Administration of Justice].

Second, § 4759(a)(4), which covers the refusal of entry into premises for inspection authorized by law, has not been retained. Like § 4759(a)(3), § 4759(a)(4) is covered by Section 3304 [Obstructing the Administration of Justice] and has been specifically incorporated into the grading scheme there.

Comment on Section 5206. Unlawful Possession of a Prescription Form

Corresponding Current Provision(s): 11 Del. C. § 841C

Comment:

Generally. Section 5206 creates an offense prohibiting the unlawful possession of a prescription form.

Relation to current Delaware law. Section 5206 corresponds directly to 11 Del. C. § 841C(a). Note that the theft offense in § 841C(b) is covered by various offenses in Chapter 2100 [Theft]. Additionally, unlike § 841C(a), Section 5206 does not include a definition of "possession" specifically for this offense because proposed Section 204 defines "possession" generally for the entire Proposed Code.

Comment on Section 5207. Internet Pharmacy Offenses

Corresponding Current Provision(s): 16 Del. C. §§ 4743, 4744

Comment:

Generally. Section 5207 combines a number of offenses in current Delaware law related to internet pharmacies, including: distributing or prescribing drugs through, patronizing, and advertising an internet pharmacy.

Relation to current Delaware law. Section 5207(a) defines the offense of distributing or prescribing drugs through an internet pharmacy. Subsection (a)(1) covers the offense conduct in 16 Del. C. § 4744(a)(1), but simplifies it by dividing it into its elements for easier reading and application. Subsection (a)(1) also incorporates the definition of a "Delaware patient" found in 16 Del. C. § 4743(2) directly into the offense definition, rather than referencing the defined term. In adapting the definition of "Delaware patient" for inclusion in the offense definition, only the key elements of the definition were retained. This includes the language about a request being made by the person and a delivery of the prescription drugs being within Delaware. Note that the offense definition in Subsection (a)(1), coupled with accomplice liability in proposed Section 211, also covers the offense conduct in § 4744(d). The exception in Section 5207(d)(1) for practitioner-patient relationships extends to cases of purported accomplice liability under proposed Section 211. Subsection (a)(2) corresponds to 16 Del. C. § 4744(c)(1), but simplifies it by dividing it into its elements for easier reading and application. Subsection (a)(2)(B) clarifies what "knowingly" means as to the offender's state of mind in § 4744 (c)(2) by incorporating the standard into the offense definition.

Section 5207(b) defines the offense of patronizing an internet pharmacy, corresponding to 16 Del. C. § 4744(e)(1). Section 5207(b) simplifies the offense definition in § 4744(e)(1) by dividing it into its elements for easier reading and application. The "what the person knows to be" language in Subsection (b)(2) achieves the effect of incorporating the "knowing" culpability requirement from § 4744(e)(1) directly into the offense definition.

Note that the offenses in Section 5207(a)–(b) each include an element that the drugs ordered not fill an "authorized prescription." This term stands in the place of the lengthy exceptions to liability in current law, where "the practitioner issuing the prescription drug order to be filled or dispensed by the Internet pharmacy is a licensed practitioner who has a patient-

practitioner relationship with the Delaware patient." *See* 16 Del. C. § 4744(a)(1), (c)(1), (e)(1). Instead, those clauses have been incorporated as the definition of an "authorized prescription" in Section 5210.

Section 5207(c) defines the offense of advertising an internet pharmacy, corresponding to 16 Del. C. § 4744(b)(1). Section 5207(c) simplifies the offense definition in § 4744(b)(1) by dividing it into its elements for easier reading and application.

Section 5207(d) provides an exception to criminal liability under Subsections (a)-(c). Subsection (d) establishes an exception to liability under Subsection (c) where Delaware delivery of prescription drugs is clearly excluded from an advertisement, corresponding to the exception in 16 Del. C. § 4744(b)(1). Note that the exception in Subsection (d) has been reworded to make it unnecessary to define the terms "link" or "internet site" by removing the term "link" altogether and replacing the term "internet site" with "website."

Section 5207(e) grades the offenses in Subsections (a)-(c). Note that none of the minimum fine provisions found throughout 16 Del. C. § 4744 have been included because all minimum penalties in the Proposed Code are set forth in Section 802. Subsection (e)(1) grades the offense under Subsection (a). Subsections (e)(1)(A) and (1)(C) maintain the current grading schemes in § 4744(a)(2) and (c)(2). Yet, unlike the current grading schemes in § 4744(a)(2) and (c)(2), which aggravate both conduct that causes death and serious physical injury by two grade levels, the proposed grading scheme only aggravates conduct that causes death by two grade levels. Throughout the Proposed Code, the lack of resulting death normally generates lesser punishment and the presence of an aggravating factor normally only generates a single grade increase. Accordingly, conduct that causes only serious physical injury is dealt with in Subsection (e)(1)(B) and aggravated with only a single grade increase. This decision is consistent with the grading approaches throughout the Proposed Code and allows the Class 4 felony grade to be reserved for only the worst cases.

Section 5207(e)(1) grades the offense under Subsection (b), corresponding to the current grade in 16 Del. C. § 4744(e)(2).

Section 5207(e)(2) grades the offense under Subsection (c), corresponding to the current grade in 16 Del. C. § 4744(b)(2).

Section 5207(f) lists defined terms referenced in Section 5207. The term in Subsection (f)(1) is defined in Section 5110. See the Commentary to Section 5110 for an explanation of how the defined term relates to current Delaware law. The terms in Subsections (f)(3) and (5) are defined elsewhere in the Proposed Code. Reference the Commentary to the applicable Sections for an explanation of how the defined terms relate to current Delaware Law. Finally, the terms in Subsections (f)(2) and (4) are defined outside of the Criminal Code in Title 16.

Provisions in 16 Del. C. § 4744 Not Retained. The provisions in 16 Del. C. § 4744(f)-(h) have not been included, for various reasons. First, § 4744(f), which establishes a special jurisdictional rule for offenses under § 4744, is unnecessary. Normal rules of jurisdiction for Superior Court and Court of Common Pleas will suffice for the proposed offenses under Section 5207. Second, § 4744(g), which establishes that it is not a defense to prosecution that any recipient of a prescription drug order is not prosecuted, convicted, or punished upon the same act or transaction, is unnecessary; because the proposed offenses in Section 5207 are defined so as to prohibit the *pharmacy's* conduct; the pharmacy's liability is not at all dependent on the intended recipient's criminal conduct, or lack thereof. Even if this "no defense" provision were necessary, proposed Section 211 already has a general provision dealing with this situation that achieves the same effect. Finally, § 4744(h), which covers the preservation of civil and administrative

remedies, is already covered by proposed Section 104. Generally, civil and administrative are always preserved under proposed Section 104.

Comment on Section 5208. Immunity in Life-Threatening Emergency

Corresponding Current Provision(s): 16 Del. C. § 4769

Comment:

Generally. Section 5208 establishes immunity from the use of evidence gathered as a result of summoning law enforcement or emergency medical services due to an overdose or other life-threatening emergency situation. The immunity extends to both the person suffering the medical emergency and the person summoning assistance.

Relation to current Delaware law. Section 5208 corresponds to 16 Del. C. § 4769, but is different in many ways. Section 5208 seeks to simplify the elements of the grant of immunity found in § 4769, while clarifying an ambiguity in the current provisions. Current § 4769 does not explicitly require that the immunized drug offense be connected in any way to the circumstances surrounding the overdose. Section 5208(a)(2), instead, requires that the evidence against which the defendant is immunized be obtained as a direct result of the offender summoning law enforcement or emergency medical services. Furthermore, § 4769 provides a broad grant of immunity against arrest, charge, or prosecution for a drug offense. Because the grant of immunity is so sweeping, § 4769 has very specific elements that must be satisfied before an offender can receive immunity. Summoning medical assistance in a life-threatening emergency is noble, but absolute immunity for a vaguely defined collection of drug offenses is potentially a disproportionate windfall for the offender.

Instead, Section 5208 proposes a more modest grant of use immunity for evidence gathered as a result of the offender's summoning law enforcement or emergency medical personnel, rather than absolute immunity from arrest, charge, or prosecution. Because the immunity is restricted to use of evidence, rather than prosecution for offenses, no nexus between the evidence and a particular offense need be specified. And because the immunity is more narrowly tailored to the circumstances, there is no need to elaborate highly specific elements that must be satisfied before the immunity becomes effective. Additionally, because Section 5208 does not contain a grant of absolute immunity, it is not necessary to restrict the grade of the offense to which the grant of immunity can apply, as is done in § 4769(c).

Note that Section 5208(a) requires only that the person "reasonably believes" an overdose or medical emergency is taking place. This language is taken from the definition of "overdose" in 16 Del. C. § 4769(a)(2), which currently defines an overdose to include reasonable belief that an overdose is occurring. It is more precise to define "overdose" in purely objective terms—which is done in Section 5210(i)—and instead define the immunity according to the defendant's subjective actions and beliefs.

Application to Title 4 Offenses for Underage Drinking. 16 Del. C. § 4769(d) applies the grant of immunity to offenses in Title 4 dealing with underage drinking. As those are minor regulatory offenses not incorporated into Chapter 5200, or anywhere else in the Proposed Code, it does not make sense for their immunity provision to appear in Title 11. Therefore, Section 5208 does not include those offenses. But, an immunity provision similar to Section 5208 should be added to the relevant Title 4 offenses to ensure the effect of current law is maintained.

Comment on Section 5209. Court Having Jurisdiction

Corresponding Current Provision(s): 16 Del. C. § 4795

Comment:

Generally. Section 5209 establishes the jurisdictional rules for all violations of proposed Chapter 5200. Section 5209 also provides an exception to those rules.

Relation to current Delaware law. Section 5209 corresponds directly to 16 Del. C. § 4795. Note, however, that the proposed Section does not include the provisions from § 4795 relating to civil punishments because they are purely regulatory. The rules regarding Justice of the Peace Court jurisdiction over civil punishments and Court of Common Pleas jurisdiction over violations of 16 Del. C. § 4764(d), which authorizes a maximum of five days imprisonment, should remain in Title 16. Subsection (b) provides an exception to the jurisdictional rules in Subsection (a), also corresponding to § 4795. Note that, to the extent the translation of the offenses in the proposed Chapter allows, the Sections covered under the exception in proposed Subsection (b) are the same as those covered by the exception in the current law.

Comment on Section 5210. Definitions

Corresponding Current Provision(s): 11 Del. C. §§ 222(2), 271, 511, 512, 513, 522; 16 Del. C. §§ 4701, 4773, 4743, 4751C, 4769(a)(2)

Comment:

Generally. This section collects and defines all defined terms used in Chapter 5100. Section 5210 notes that additional definitions can be found in 16 Del. C. § 4701, the definitions provisions in the current law for all drug offenses and regulations.

Relation to current Delaware law. Section 5210(a) defines "accomplice," corresponding to the definition in proposed Section 211, which is based on 11 Del. C. § 271.

Section 5210(b) defines "authorized prescription," a term not specifically defined in current law. Yet, the definition is based upon the final clauses of 16 Del. C. § 4744(a)(1), (c)(1), and (e)(1), which create an exception to prosecution for certain internet pharmacy offenses based on a "patient-practitioner relationship." The term is useful in other contexts to specify what sort of prescription precludes criminal liability for possession of prescription drugs. Specifically, it focuses on the relationship between the parties: a prescription made out by a doctor who has no clinical relationship with the recipient of the drugs is not a valid prescription for the purposes of criminal liability.

Section 5210(c) defines "co-conspirator," corresponding to the definition in proposed Section 703, which is based on 11 Del. C. §§ 511-13 and 522.

Section 5210(d) defines "controlled substance," cross-referencing the schedules of controlled drugs in Chapter 47 of Title 16 in the same way as current 11 Del. C. § 222(2).

Section 5210(e) defines "deliver" or "delivery," corresponding to 16 Del. C. § 4701(8), but with a few changes. First, the definition in Section 5210(d) does not include the "attempt" language because attempted delivery is covered by attempt liability under proposed Section 701.

Second, the definition in Section 5210(d) does not include the specific reference to controlled substances because the Proposed Code only uses generally applicable definitions.

Section 5210(f) defines "drug paraphernalia," cross-referencing the definition in 16 Del. C. § 4701(17). Subsection (f) also incorporates the exception in 16 Del. C. § 4773(2) for items intended for use with tobacco products.

Section 5210(g) defines "internet pharmacy," corresponding to the definition in 16 Del. C. § 4743(5). For simplicity, the proposed definition rewords the current definition in a few places. First, "person" in the proposed definition is inclusive of entities, so the definition no longer needs to specify "person or entity." Moreover, the term "Internet site" is replaced with the term "website," to avoid having to further define the term "Internet site" separately, as is done in the current law. Finally, the proposed definition specifies only that the orders be delivered to Delaware patients, rather than "patients, including Delaware patients," as in the current law. Note that this specification of Delaware patients does not imply that the pharmacy *exclusively serves* Delaware patients.

Section 5210(h) defines "leaf marijuana," corresponding to the definition of "leaf marijuana" within the definition of "personal use quantity" in 16 Del. C. § 4701(33).

Section 5210(i) defines "overdose," corresponding to the current definition in 16 Del. C. § 4769(a)(2). Yet, the language of reasonable belief has been omitted. Instead, that language is used to define the conditions of the immunity in proposed Section 5208(a)(1)(A).

Section 5210(j) defines "registrant," creating a new definition based on the terminology currently used in Title 16.

Section 5210(k) defines a "Tier 1 quantity" of a controlled substance, corresponding to 16 Del. C. § 4751C(1).

Section 5210(l) defines a "Tier 2 quantity" of a controlled substance, corresponding to 16 Del. C. § 4751C(2).

Section 5210(m) defines a "Tier 3 quantity" of a controlled substance, corresponding to 16 Del. C. § 4751C(3).

Section 5210(n) defines a "Tier 4 quantity" of a controlled substance, corresponding to 16 Del. C. § 4751C(4).

Section 5210(o) defines a "Tier 5 quantity" of a controlled substance, corresponding to 16 Del. C. § 4751C(5).

CHAPTER 5300. OFFENSES INVOLVING ORGANIZED CRIME AND RACKETEERING

Section 5301. Organized Crime and Racketeering
Section 5302. Gang Participation
Section 5303. Money Laundering
Section 5404. Definitions

Comment on Section 5301. Organized Crime and Racketeering

Corresponding Current Provision(s): 11 Del. C. §§ 476, 477, 1503, 1504; *see also* 1501, 1505, 1506, 1507, 1508, 1509, 1510, 1511

Comment:

Generally. This provision defines the offense of organized crime and racketeering, which is intended to punish and prevent: (1) the infiltration and acquisition of legitimate economic enterprises by racketeering practices, and (2) the use and exploitation of both legal and illegal enterprises to further criminal activities.

Relation to current Delaware law. Section 5301(a) generally corresponds to 11 Del. C. § 1503. Yet, Subsection (a) specifies that the offense must be committed "knowingly," whereas § 1503 fails to specify a required level of culpability. Under proposed Section 205, "recklessness" would be read in by default. But, given the high grade of this offense and the offense conduct required, it seems unlikely that the General Assembly intended for mere recklessness to support liability for racketeering. Therefore, "knowingly" has been specified instead. Subsection (a)(1) corresponds with 11 Del. C. § 1503(a), but with one minor difference. The proposed provision replaces the current clause "employed by, or associated with, any enterprise to conduct or participate in the conduct of the affairs of the enterprise through a pattern of racketeering activity . . . ." with "conducts or participates in the affairs of an enterprise through a pattern of racketeering activity . . . ." The proposed change is simpler but keeps the original provision's breadth by removing the "employed" and "associated" language altogether and simply focusing on the offense conduct.

Section 5301(a)(2) is substantially similar to 11 Del. C. § 1503(b). The proposed provision replaces the current provision's "real property or personal property of any nature, including money" with "property." The term "property" is sufficient to include all types of property, including money, because of its broad definition in Section 805(d)(3) of the Proposed Code.

Section 5301(a)(3) corresponds with 11 Del. C. § 1503(c), but with two minor changes. First, the proposed provision eliminates the current clause "in which such person has participated" after "pattern of racketeering activity" because the clause does not appear elsewhere in § 1503, and because using racketeering proceeds to establish an enterprise should be punishable regardless of whether the person participated in the racketeering activity that generated the proceeds. Second, the proposed provision eliminates the clause "any part of such proceeds or any proceeds derived from the investment or use thereof" because "directly or indirectly" is broad enough that use of indirect proceeds such as investment proceeds will fall under the provision. Third, the proposed provision uses the term "property" instead of "real property or personal property."

Section 5301(a) does not include 11 Del. C. § 1503(d), which prohibits conspiring to violate or attempting to violate any of the organized crime and racketeering provisions, because conspiracy and attempt are covered by the inchoate offenses in Sections 701 and 703.

The current provisions do not specify a culpability requirement for this offense, meaning that "reckless" would be read in based on Section 205(d) of the Proposed Code. But, knowing, not reckless, may be a more appropriate culpability requirement for this offense. The draft text includes a footnote raising this issue.

Section 5301(b) maintains the grading provision found in 11 Del. C. § 1504(a).

Section 5301(c) is substantially similar to 11 Del. C. § 1504(b), with three minor changes. First, the proposed provision replaces the phrase "any real or personal property" with "any property or other benefit" because referenced items like positions, offices, appointments, and the like are not "real or personal property," but are nevertheless subject to forfeiture under this Subsection. Second, the proposed provision streamlines and summarizes the current provision's language. Third, the proposed provision does not include 11 Del. C. § 1504(b)(3) and (4) because the forfeitable benefits discussed in those provisions are adequately covered by the proposed provision and do not need to be separately addressed.

Section 5301(d) is substantially similar to 11 Del. C. § 1504(c), with streamlined wording.

Section 5301(e) corresponds to 11 Del. C. § 477, establishing a defense and a sentencing mitigation for voluntary and complete renunciation of a racketeering offense. The renunciation defense in § 477(a) is very similar to the renunciation defense for the inchoate offenses of attempt, conspiracy, and solicitation in proposed Section 706. This makes sense because racketeering has an aspect of group criminality that is conceptually very similar to conspiracy liability. Therefore, Subsection (e)(1) defines the defense by reference to Section 706, rather than setting forth its elements independently. This signals that the defenses' elements are effectively identical: the defendant must make a "voluntary and complete renunciation," as defined in Section 706(b), and must take further steps that prevent commission of the offense originally intended. Subsection (e)(2) provides a sentencing mitigation, rather than a defense, where the defendant's efforts do not actually prevent the offense, but the defendant's efforts to prevent it were substantial. By making reference to Subsection (e)(1)'s defense, Subsection (e)(2) is intended to incorporate its elements except as to prevention of the offense. So, under Subsection (e)(2), the defendant's substantial efforts to prevent commission of the offense must still be made "under circumstances manifesting a voluntary and complete renunciation of his or her criminal purpose." *See* Section 706(a)(2).

Section 5301(f) directly corresponds to 11 Del. C. § 476, specifying certain defenses that defendants alleged to commit racketeering as a part of a group or organization are not permitted to raise. Subsection (f)(1) preserves Delaware's rejection of the "unconvictable confederate" defense to group liability, which is a concept borrowed from inchoate offenses of conspiracy and solicitation. Because those provisions are identical in substance, Subsection (f)(1) explicitly utilizes the same elements as those in Section 704. This ensures consistent interpretation and application of this provision, and prevents two separate, but identical, provisions from evolving differently through future case law. Subsection (f)(2) preserve's Delaware's rejection of a defense based upon non-membership in a racketeering organization where membership in the organization has changed over time, but at least two original members remain.

Current Provisions Not Retained. Section 5301 does not incorporate several provisions from the current code. The first is 11 Del. C. § 1501, which states the purpose of the racketeering

provisions. This Commentary provides a general statement of purpose in the "Generally" paragraph above. Second, the proposed Section does not include 11 Del. C. §§ 1505, 1506, 1507, 1508, 1509, 1510, and 1511. Each of those provisions relates to matters that do not belong in the criminal code, such as civil remedies, forfeiture proceedings, liens, investigative powers of the Attorney General, registration of foreign corporations, and use of forfeited funds for law enforcement purposes. It appears that the Delaware Code does not currently contain robust, general provisions for forfeiture proceedings. The procedural forfeiture provisions found in these sections should be eliminated in favor of new, general provisions elsewhere in the Delaware Code, and the provision relating to registration of foreign corporations should be moved to a part of the code dealing with corporate regulation. Failure of a foreign corporation to register as required may or may not be evidence of racketeering, and it is not a racketeering offense in and of itself.

Comment on Section 5302. Gang Participation

Corresponding Current Provision(s): 11 Del. C. §§ 616, 617

Comment:

Generally. This provision defines the offense of gang participation, prohibiting active participation in a criminal street gang and recruitment of juveniles into a criminal street gang.

Relation to current Delaware law. Section 5302(a) corresponds with 11 Del. C. § 616(b), with one minor change. The proposed provision replaces the phrase "actively participates in any criminal street gang" with "performs any role that benefits a criminal street gang." The change is due to the Delaware Supreme Court's holding in *Taylor v. State*, 76 A.3d 761 (Del. 2013) that "actively participates in any criminal street gang" means "performs some role to benefit a criminal street gang."

Section 5302(b) corresponds with 11 Del. C. § 617(b)(1), with four minor changes. First, the proposed provision replaces "juvenile or student" with "juvenile." Second, the proposed provision eliminates the concept of "criminal youth gangs" and refers to all types of gangs as criminal street gangs. Third, the proposed provision eliminates § 617(b)(2), which additionally punishes any person who threatens or harms a juvenile to encourage the juvenile to join, remain in, or submit to a demand by a criminal street gang, because threatening and committing criminal conduct resulting in harm are already punishable under Sections 1101 (Aggravated murder), 1202 (Assault), 1206 (Terroristic threats), 1404 (Coercion), and 2304 (Criminal damage) of the Proposed Code. Fourth, the proposed provision adds the culpability requirement "knowingly" because it is the minimal appropriate level of culpability needed for the conduct covered by this Section to be criminally punishable.

Section 5302(b) is necessary because the inchoate offense of solicitation would not reach the conduct prohibited by this offense. One must actively participate or perform some role to benefit the gang to be guilty of gang participation. Therefore, merely soliciting a juvenile to join a gang, without specifically soliciting the juvenile to join a gang to perform some act to benefit the gang, would not be punishable by the inchoate offense of solicitation. The proposed provision does eliminate "attempts to cause" because attempts to recruit a juvenile would be covered by the inchoate offense of attempt in Section 701 of the Proposed Code.

Section 5302(c)(1) maintains the grading provision found in 11 Del. C. § 616(b). The proposed provision removes the sentencing enhancements found in 11 Del. C. § 616(c) because those enhancements are covered by the general grade adjustment in Section 804 of the Proposed Code.

Section 5302(c)(2) maintains the grading provision found in 11 Del. C. § 617(b)(1).

Comment on Section 5303. Money Laundering

Corresponding Current Provision(s): 11 Del. C. § 951

Comment:

Generally. This provision defines the offenses of money laundering and structuring.

Relation to current Delaware law. Section 5303(a)(1) and (2) are substantially similar to 11 Del. C. § 951(a)(1) and (2).

Section 5303(a)(3) corresponds with 11 Del. C. § 951(a)(3), with one minor difference. The proposed provision eliminates the current provision's phrase "or funds that the person believes are the proceeds of criminal activity" because mistake of fact is covered by Section 206 of the Proposed Code.

Section 5303(a)(4) corresponds with 11 Del. C. § 951(a)(4), with three minor differences. First, the proposed provision replaces "finance or invest" with "provides, holds, or invests." In the context of "knowingly finance[ing] or invest[ing] or intend[ing] to finance or invest funds that the person believes are intended to further the commission of criminal activity," 11 Del. C. § 951(a)(4), the phrase "finance funds" is problematic because one cannot "finance funds" based on any common usage of the words. Second, the proposed provision removes "believes" in the context of funds intended to further the commission of criminal activity because mistake of fact is covered by the general part. Third, the proposed provision removes "or intends to use or invest" because intention without conduct cannot be punishable.

Section 5303(a)(5) is substantially similar to 11 Del. C. § 951(a)(5).

Section 5303(b) corresponds with 11 Del. C. § 951(f), with one minor change. The proposed provision summarizes the current provision's "or of 31 U.S.C. § 5311 et seq. or 31 C.F.R. § 103 et seq., or any rules or regulations adopted under those chapters and sections" with "or the United States."

Section 5303(b)(1) corresponds with 11 Del. C. § 951(f)(1) and (2), with two minor changes. First, the proposed provision eliminates entities such as video lottery facilities from the illustrative list of entities required to file reports. If these entities are required to file reports, they are included in the clause "or any other individual or identity required by law to file a report regarding currency transactions or suspicious transactions." Second, the proposed provision eliminates the current provision's "attempt to cause" language because an attempt to structure is punishable under the inchoate offense of attempt in Section 701 of the Proposed Code.

Section 5303(b)(2) corresponds with 11 Del. C. 951(f)(3), with two minor changes. First, the proposed provision eliminates the attempt language found in the current provision because attempt is punishable under the inchoate offense of attempt in Section 701 of the Proposed Code. Second, the proposed provision incorporates the definition of "structuring" into the offense definition itself.

Although some offenses already prohibit fraud regarding public records and reports, structuring is a sufficiently different and serious offense to warrant its own provision. Structuring involves executing financial transactions in a specific pattern calculated to avoid the creation of certain records and reports required by law. For instance, in the context of bank deposits, a defendant might intentionally parcel one large sum of money into a series of smaller transactions to avoid scrutiny. The current fraud provisions found in Chapter 2200 and Chapter 3200 do not directly address the conduct prohibited by this Section. Although Sections 2202 and 3203 address "tampering" with public documents, instances of structuring would not necessarily fall under those provisions.

Section 5303(c) maintains the grading provisions found in 11 Del. C. § 951(e) and (g).

Section 5303(d) is substantially similar to 11 Del. C. § 951(b).

Section 5303(e) is substantially similar to 11 Del. C. § 951(d).

Definitions omitted. The proposed provision eliminates currently defined terms such as "criminal activity" and "funds" because they do not require a definition. The proposed provision also eliminates the currently defined term "funds that the person believes are the proceeds of criminal activity," which defines the term so as to include funds that are not the proceeds of criminal activity, because the reference to "believe" was already eliminated in Subsection (a) for the reasons given above.

Comment on Section 5304. Definitions

Corresponding Current Provision(s): 11 Del. C. §§ 616, 951, 1502

Comment:

Generally. This Section provides definitions of key terms used in this Chapter.

Relation to current Delaware law. Section 5304(a) provides a definition of "criminal street gang" that corresponds with 11 Del. C. § 616(a)(1), with one minor change. Whereas proposed Section 5304(a)(3) uses the phrase "the commission of criminal offenses," current § 616(a)(1)uses the phrase "the commission of 1 or more" listed predicate acts. The predicate acts are numerous and varied. Streamlining the offense to include all criminal offenses is simpler.

Section 5304(b) provides a definition of "enterprise" that corresponds with 11 Del. C. § 1502(3), with two minor changes. First, the proposed provision eliminates the word "individual" from the current provision's list of entities that may constitute an enterprise because a sole proprietorship is the only individual that can also be an enterprise. Second, the proposed provision eliminates the current provision's phrase "whether in relation to an illicit or licit enterprise or . . . other entity." "Governmental" is retained as part of the proposed definition.

Section 5304(c) provides a definition of "pattern of criminal gang activity" that corresponds with 11 Del. C. § 616(a)(2), with three changes. First, the proposed provision eliminates "attempted commission of, conspiracy to commit, solicitation of, or conviction of" because most are already covered by the inchoate provisions found in proposed Section 700 and "or conviction" is unnecessary. Second, the proposed provision eliminates the now unnecessary jurisdictional requirements that one of the offenses must have occurred after July 1, 2003. Third, the proposed provision eliminates a statutory list of predicate offenses, each of which deals with a certain type of gang-related crime, and replaces it with any incidents of conduct that "constitute

felony violations of offenses involving violence, coercion, sexual activity, controlled substances, property damage, or deadly weapons."

Section 5304(d) provides a definition of "pattern of racketeering activity" that corresponds with 11 Del. C. § 1502(5) and (9), with four minor changes. First, the proposed provision eliminates the current provision's jurisdictional requirement that at least one of the incidents of conduct must have occurred after July 9, 1986 because this provision is no longer necessary. Second, the proposed provision eliminates the current clause "to attempt to engage in, to conspire to engage in or to solicit, coerce or intimidate another person to engage in" because such conduct is covered by the inchoate offense provisions in Sections 701-03 of the Proposed Code. Third, as discussed below, proposed Section 5304(d)(3) alters 11 Del. C. § 1502(9)'s definition of what it means to constitute racketeering. Fourth, while the current code separately defines "pattern of racketeering activity" and "racketeering," the proposed provision combines the two terms into one definition of "pattern of racketeering activity."

Section 5304(d)(3)(A) maintains the current provision's reference to 18 U.S.C.A. § 1961(1)(A), (1)(B), (1)(C), and (1)(D) because, by incorporating the federal definition of "racketeering activity," the Delaware General Assembly evidenced an intent to track the federal list of offenses that constitute racketeering activities, which may be amended from time to time. If the United States Congress adds or removes an offense from the federal definition of racketeering activity, that change will automatically be incorporated into Section 5301(e)(2).

The proposed Section 5304(d)(3)(B) replaces the current provision's list of state offenses that constitute racketeering activity, which are "any activity constituting a felony which is chargeable under the Delaware Code or any activity constituting a misdemeanor" under certain listed provisions of the Delaware Code with the simpler phrase "a felony under this Code." The proposed provision eliminates misdemeanors from offenses that may constitute racketeering activity for two reasons. First, the current definition of "pattern of racketeering activity" found in 11 Del. C. § 1502(5) stipulates that for conduct to constitute a pattern of racketeering activity at least one of the incidents of conduct must constitute "a felony under the Delaware Criminal Code, or if committed subject to the jurisdiction of the United States or any state of the United States, would constitute a felony under the Delaware Criminal Code if committed in the State." That clause indicates that a number of misdemeanors alone cannot constitute predicate acts for a racketeering offense. Second, punishing conduct under the Class 4 felony of racketeering, maximum punishment for which is 25 years, would be grossly disproportionate if the conduct is normally punished as a misdemeanor, which is punishable by one year of imprisonment, at most. Further, many of the "misdemeanors" enumerated in the current provision, such as forgery and counterfeiting, are already felonies.

When interpreting and applying Subsections (d)(1)–(2), consider *Stroik v. State*, 671 A.2d 1335 (Del. 1996), which discussed the relationship of underlying predicate offenses in a pattern of racketeering activity. *Stroik* cited with approval *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229 (1989), where the United States Supreme Court considered the relational nexus of predicate acts to satisfy a conviction under the federal Racketeer Influenced and Corrupt Organizations Act, and held that predicate acts are related if they "have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 240 (1989).

Section 5304(e) provides a definition of "proceeds" that is identical to 11 Del. C. § 951(c)(4).

Section 5304(f) provides a definition of "unlawful debt" that is substantially similar to 11 Del. C. § 1502(12).