

EXHIBIT

A

**Table of Changes to the Improved Code Pre-introduction of SB 209
in Response to Concerns of the Attorney General, Law Enforcement,
Victims’ Advocates and State Agencies**

From the beginning of the legislatively mandated criminal code review and drafting process, the drafters have sought comments and concerns from all of the stakeholders, including the Delaware Department of Justice (DDOJ), the criminal defense bar, Law Enforcement, Victims’ Advocates, state agencies, and the general public. The draft Code has been publicly available since March 21, 2017 and the drafting group has continued to consider changes to the Code, including some understood to be of interest to the DDOJ.

The following changes were made before introduction of SB 209 in the spring of 2018.

Improved Code provision	Section Title	Stated Concern	Action taken by Improved Code Working Group in response to constituency’s comment
DDOJ & Victims’ Advocate Comments			
§ 103	Definitions.	The Improved Code utilizes a definition of “physical injury” that reflects current law’s definition for adult victims, but not the definition used in crimes against children. The child-specific definition requires less harm to be caused, and makes the offenses easier to prove for child victims. <i>[Raised by CPAC and DDOJ.]</i>	Change the definition of “physical injury” to incorporate current law’s approach for child victims, to ensure children receive the same level of protection under the law as they do currently.
§ 103	Definitions.	The Improved Code utilizes a definition of “serious physical injury”	Change the definition of “serious physical injury” to incorporate current law’s approach for child

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		that reflects current law's definition for adult victims, but not the definition used in crimes against children. The child-specific definition requires less harm to be caused, and makes the offenses easier to prove for child victims. <i>[Raised by CPAC and DDOJ.]</i>	victims, to ensure children receive the same level of protection under the law as they do currently.
§ 107	State Criminal Jurisdiction	This section requires that a defendant act with recklessness before allowing the State to have jurisdiction over the defendant whereas current law only requires negligence. <i>[Raised by DDOJ.]</i>	The Working Group amended the section to require that the defendant act negligently, not recklessly.
§ 108	Burdens of Proof; Permissive Inferences	This section is confusing because explanation of which party bears the burden of persuasion precedes the burden of production. <i>[Raised by DDOJ.]</i>	The Working Group's response to this valid point is to reverse the order of these subsections, putting the burden of production first.

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§ 108(c)	Burden of Persuasion; Burden on the State	Section 106(c) ¹¹² reads as if the State bears the burden of “disproving all justification defenses beyond a reasonable doubt (Proposed Section 301(f)) after the defendant has met his or her burden of production (Proposed Section 106(c)(2)) sufficient to allow a finding of the defense by preponderance of the evidence (a burden of persuasion).” <i>[Raised by DDOJ.]</i>	The Working Group restructured Section 108 to reduce any potential for confusion.
Former § 108	Definitions; General Definitions	This section contains both a limited list of definitions and statutory principles for defining terms. <i>[Raised by DDOJ.]</i>	The Working Group agrees, and notes that these provisions have already been changed. To avoid such commingling, the principles of definitions were moved to the section before the index, and all definitions throughout the code were combined together in Section 103.
§ 201	Basis of Liability	Use of the word “defense” in subsections	The Working Group agrees and has revised

¹¹² Note that the Attorney General’s Office’s comments referred to sections of the draft code contained in the Final Report presented by the Criminal Justice Improvement Committee. These sections were re-numbered when turned into a bill. Therefore, the section numbers in the “Stated Concern” column is not the same as those in the other columns.

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		(1) and (2) make the provision confusing to read. <i>[Raised by DDOJ.]</i>	subsection (2) to read “ <u>general</u> defense” instead to reduce the potential for confusion.
Former § 209	Customary License; De Minimis Infractions; Conduct Not Envisaged by General Assembly as Prohibited by the Offense	This section represents a departure from the well-established role of the judicial officer in Delaware law. <i>[Raised by DDOJ.]</i>	The Working Group deleted this section from the Improved Code.
§ 211	Voluntary Intoxication	This section could be read to make voluntary intoxication not an excuse for criminal liability, which is a departure from current policy. <i>[Raised by DDOJ.]</i>	The Working Group revised this section to conform to 11 Del. C. § 421, which makes voluntary intoxication not a defense or excuse from criminal liability.
§ 302	Choice of Evils	This section could be read to place the burden on the State to establish beyond a reasonable doubt that there is a “legislative purpose” to exclude the justification. <i>[Raised by DDOJ.]</i>	The Working Group amended this section to make clear that “legislative purpose” is not an element of the justification defense.
§ 602 & § 1003	Manslaughter & Authorized Terms of Imprisonment	Under current law Manslaughter has a 2-year mandatory minimum sentence whereas Section	The Working Group revised §§ 1003 and 602 to provide for a mandatory minimum sentence of 2

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		1103 of the Improved Code governing Manslaughter does not provide for a mandatory minimum sentence. <i>[Raised by DDOJ.]</i>	years and a maximum of 25 years for Manslaughter in keeping with current law.
§ 604	General Adjustments to Offense Grade	The IC departs from current policy that makes a vulnerable person for purposes of grade enhancement anyone over 62 years of age without the need of evidence of additional impairment. <i>[Raised by DDOJ.]</i>	The Working Group revised § 604 to provide that a victim's age alone (being 65 years of age or older), without additional impairment, increases an offense's grade.
§ 1002	Murder.	The Improved Code lessens the potential and minimum punishment for reckless killings of law enforcement officers, which are currently punished as murder. <i>[Raised by DDOJ.]</i>	Initially, these killings were treated as manslaughter under an early draft of the Improved Code. Anticipating the DDOJ's concern, an additional homicide offense was created to provide a higher grade for reckless killings of law enforcement, but at a lesser grade than intentional, aggravated murder.
§ 1004	Criminally negligent homicide. (of a child)	The Improved Code consolidates the current offense of Murder by Abuse or Neglect—of a child—into a homicide	Divide the adult and child provisions into two separate offenses,

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		offense designed for adult victims, potentially limiting the offense's usefulness for prosecuting child abuse resulting in death. <i>[Raised by DDOJ and CPAC.]</i>	reflecting the approach of current law.
§ 1022	Assault with deadly weapon	Assault with a deadly weapon resulting in physical injury or serious physical injury graded too low. <i>[Raised by DDOJ.]</i>	Amendments were made to § 1022 providing that: <ul style="list-style-type: none"> • Assault with a deadly weapon causing physical injury now a Class 7 felony with max punishment of 8 years; and • Assault with deadly weapon causing serious physical injury regraded to a Class 5 felony with 2-25 years in prison.
§ 1022(c)(1)	Enhanced aggravated assault (child under 14)	The Improved Code consolidates knowing abuse of a child under 14 resulting in serious physical injury into the Assault offense, which is designed for adult victims. This potentially limits the offense's usefulness for prosecuting child abuse cases. <i>[Raised by DDOJ and CPAC.]</i>	Divide the adult and child provisions into two separate offenses, reflecting the approach of current law.

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§ 1023	Reckless injuring	This section should be amended to cover special victims including law enforcement and first responders etc. <i>[Raised by DDOJ.]</i>	The Working Group amended this section to include such groups with a grade enhancement.
§ 1023(b)(1)	Reckless injuring (child under 14)	The Improved Code consolidates reckless abuse of a child under 14 resulting in serious physical injury into the Reckless Injuring offense, which is designed for adult victims. This potentially limits the offense's usefulness for prosecuting child abuse cases. <i>[Raised by DDOJ and CPAC.]</i>	Divide the adult and child provisions into two separate offenses, reflecting the approach of current law.
§ 1023(b)(2)	Reckless injuring (child under 4)	The Improved Code consolidates reckless abuse of a child under 4 resulting in physical injury into the Reckless Injuring offense, which is designed for adult victims. This potentially limits the offense's usefulness for prosecuting child abuse cases. <i>[Raised by DDOJ and CPAC.]</i>	Divide the adult and child provisions into two separate offenses, reflecting the approach of current law.
§ 1023(b)(2)	Reckless injuring (child with intellectual or physical disability)	The Improved Code consolidates reckless abuse of a child under 14 with an intellectual or physical disability	Divide the adult and child provisions into two separate offenses,

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		resulting in physical injury into the Reckless Injuring offense, which is designed for adult victims. This potentially limits the offense's usefulness for prosecuting child abuse cases. <i>[Raised by DDOJ and CPAC.]</i>	reflecting the approach of current law.
§ 1023(b)(2)	Reckless injuring (child, and involving deadly weapon/dangerous instrument)	The Improved Code consolidates reckless abuse of a child under 14 by means of a deadly weapon or dangerous instrument resulting in physical injury into the Reckless Injuring offense, which is designed for adult victims. This potentially limits the offense's usefulness for prosecuting child abuse cases. <i>[Raised by DDOJ and CPAC.]</i>	Divide the adult and child provisions into two separate offenses, reflecting the approach of current law.
§ 1024	Reckless endangerment	The Improved Code relies upon Reckless Endangerment offense to cover the conduct prosecuted as Endangering the Welfare of a Child (EWC) under current law. This offense is designed for adults, not children, and does not provide the same clarity or coverage as EWC.	Restore EWC as an independent offense, and not rely upon Reckless Endangerment for prosecution. As part of this change, the defense for "Treatment of a child by prayer," previously consolidated under Reckless Endangerment,

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		<i>[Raised by DDOJ and CPAC.]</i>	was placed with EWC instead.
§ 1025	Operating a Vehicle While Under the Influence of Drugs or Alcohol	The draft Improved Code classifies all DUIs as misdemeanors punishable by no more than 6 months in prison, whereas current law punishes recidivist behavior as felonies and provides for escalating prison terms. <i>[Raised by DDOJ.]</i>	Amendments were made to § 1025 providing that: <ul style="list-style-type: none"> • DUI 1st regraded as Class A misdemeanor punishable up to 1 year in prison; • DUI 3rd regraded as a Class 9 felony punishable up to 2 years in prison; and • DUI 4th regraded as a Class 7 felony punishable up to 8 years in prison • DUI 5th regraded as a Class 6 felony punishable up to 15 years.
§ 1041(a)	Rape; Sexual Assault. (Offense defined)	The Improved Code removes the defined term “without consent” as used in sexual offenses under current law, and the Commentary accompanying the Improved Code does not make clear why this was done. <i>[Raised by DDOJ.]</i>	The Commentary will be revised to explain with greater clarity that this approach is intended to eliminate an irrational provision of current law that requires a victim to make a show of resistance to sexual aggression in order for the law to treat the act as “without consent.” The language of the defined term is incorporated into the

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			offense definition, not abandoned altogether. Note that victim advocates have indicated their approval of this change.
§ 1401(c)(1)	Possessing a Firearm or Deadly Weapon during the Commission of a Felony	§5101 graded too low. <i>[Raised by DDOJ.]</i>	The Working Group revised the section making possessing a firearm during the commission of a felony a Class 4 felony with sentence range of 3-30 years, and possessing a deadly weapon during the commission of a felony a Class 5 felony with a sentence range of 2-25 years.
§ 1404	Possessing or Purchasing a Deadly Weapon by Persons Prohibited	§ 5104 is graded too low and fails to have a minimum sentence for someone illegally in possession of a firearm due to a prior felony conviction. <i>[Raised by DDOJ.]</i>	The Working Group revised § 1404 to regrade PDWBPP from Class 6 felony to Class 5 felony punishable with a sentence of 2-25 years if the defendant was previously convicted of a felony.
§ 1404(c)(1) and § 602	Possessing or Purchasing Deadly Weapons by Persons Prohibited. (Grading)	The Improved Code eliminates minimum mandatory sentences for persons who are illegally in possession of firearms because of past violent felony convictions, even if those persons have been convicted of illegal	The Working Group added a Class 5 felony grade of this offense for offenders with a single prior conviction for illegal possession, making a conviction under that grade eligible for a

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		firearm possession on multiple previous occasions. <i>[Raised by DDOJ.]</i>	mandatory minimum sentence under § 602.
§ 1408(a)	Grade Adjustment for Offenses Committed in a Safe School and Recreation Zone	The IC does not provide for a grade enhancement if the weapons offense is committed in a school zone. <i>[Raised by DDOJ.]</i>	The Working Group increased the grade of an offense under Sections 1402, 1403, or 1404 s by one grade if the weapon was possessed in one of the following circumstances, unless the weapon was possessed for the purpose of engaging in any school-authorized activity:
Chapter 14, Subchapter II	Drug and Related Offenses	In 149 th Sessions of General Assembly <i>DDOJ</i> introduced drug bill SB 34.	Working Group revised Ch. 14, Subch. II of the IC to reflect positive aspects of the AG's drug bill: <ul style="list-style-type: none"> • Reduction of the number of drug "Tiers" from 5 to 3; • Removal of all aggravating factors besides school zones; • Reduction of number of offenses to which the school zone aggravator applies; and • Shifting the location and

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			quantity of prescription drugs among the "Tiers," for greater equity.
§ 1423(c)(1)a.	Manufacture and delivery of Controlled Substances	The IC does not provide for minimum mandatory sentences for drug dealing offenses. <i>[Raised by DDOJ.]</i>	The Working Group revised the IC to provide that drug dealing in a top Tier quantity Schedule I or II drug has a sentence of 2-25 years.
Attorneys for Police Unions / Law Enforcement Comments			
§ 205(b)(4)	Culpability Requirements	IC §205(b)(4) establishes criminal liability for what it terms "Negligence," while defining such as a "gross deviation" from the standard of care, which is the traditional definition for "Criminal Negligence." <i>[Raised by Attorneys for Police Unions.]</i>	This section of the Improved Code was revised to substitute "Criminal Negligence" for "Negligence."
§ 304	Law Enforcement Authority Use of Force	It could be argued that this section imposes strict liability on law enforcement if while using force in commission of duties an innocent person is	The Working Group revised § 304(c) to make clear that law enforcement has immunity from criminal

		injured. <i>[Raised by Attorneys for Police Unions.]</i>	prosecution so long as they do not act with criminal negligence or recklessness. The Commentary was also changed to reflect there is no intent to impose stricter liability on law enforcement than is current policy.
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§ 1101	Consolidated Grading of Theft Offenses	The value amount of stolen property required before a theft becomes a felony is too high (\$5,000.00). <i>[Raised by Law Enforcement.]</i>	Working Group amended § 1101 to restore the felony theft amount back to \$1,500.00 in accordance with current law; and lowered the amount needed for a Class A misdemeanor theft to \$1,000.00.
Victims' Advocate Groups' Comments			
§ 1022	Assault	The IC does not provide for Strangulation as a stand-alone offense distinct from Assault. <i>[Raised by various Victims' Advocate Groups.]</i>	The Working Group made amendments to § 1022 providing that Strangulation was broken out as a special form of enhanced Assault, and was graded as a Class 8 felony punishable up to 4 years instead of being a Class A misdemeanor as for simple assault.
§ 1041(f)	Rape and Sexual Assault, No Defense	The IC lowers the age of victim eligible for this	The Working Group revised § 1041(f) to

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	for Mistake as to Age Under 14	defense from 16 to 14. <i>[Raised by various Victims' Advocate Groups.]</i>	restore strict liability for victims aged 16 and under, not 14.
§ 1132	Unauthorized Impersonation	This section should be amended to include fraudulently impersonating a member of armed forces. <i>[Raised by various Victims' Advocate Groups.]</i>	The Working Group amended this section to include impersonating members of the armed forces.
§ 1303	Stalking\Harassment	Stalking should not be treated as a type of harassment as it is distinct offense with different mens rea. <i>[Raised by Victims' Advocate Groups.]</i>	<p>The Working Group made amendments providing that:</p> <ul style="list-style-type: none"> • § 1303(a)(2) was added to capture the unique mens rea of Stalking; and • Stalking was given its own offense definition within the section rather than couching it in the grade provisions.
State Agency Comments			
§ 1145	Causing or risking catastrophe; ecological catastrophe	In the Improved Code, (1) the environmental offense mentions "solid waste" but does not cover improper release of hazardous waste, toxic air emissions or polluting water sources, and (2) the	Add a new section (§1146) for serious environmental crimes that may not rise to level of "catastrophe" such as: dangerous violations of environmental statutes and regulations; unsafe

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		<p>term “ecological catastrophe” sets the bar too high for what constitutes a punishable result. A new section should be added to cover environmental crimes that do not rise to that level, but are still felonies that cause significant environmental damage. <i>[Raised by Department of Natural Resources and Environmental Control.]</i></p>	<p>handling of hazardous waste; and improper disposal of solid waste.</p>
Miscellaneous			
§ 602(a)(1)	Authorized Terms of Imprisonment	<p>Comment: This section may be subject to a constitutional challenge by making life imprisonment mandatory for persons convicted of a Class 1 felony and not making an exception for person under 18 years of age. <i>See Rauf v. State</i>, 145 A.3d 430 (Del. 2016)</p>	<p>The Working Group revised § 602(a)(1) to provide that minors convicted of a Class 1 felony be subject to a sentence of 25 years to life and not mandatory life imprisonment.</p>
§ 1243(b)(1)b.	Obstructing Administration of Law or Other Government Function	<p>Comment: This section should include failing to comply with an investigative demand of the Attorney General's office.</p>	<p>The Working Group amended the section to make it a Class 8 felony to obstruct the Attorney General investigation.</p>