



Barrier Crimes (SB 353)

September 23, 2014

Overview



- Study Authorization
- Senate Bill 353
- Background
- Strengths and Weaknesses of Current Language Used in Barrier Crimes Statutes
- Policy Options

Study Authorization



- Senate Bill 353 (SB 353) was introduced by Senator John Edwards during the Regular Session of the 2014 General Assembly.
- The bill was amended in the nature of a substitute, passed by the Senate, and referred to the House Courts of Justice Committee, where it was left in committee.
- A letter request was sent by the Committee requesting the Crime Commission to review the bill.

Senate Bill 353



- The focus of SB 353 was to reorganize various barrier crimes statutes.
- These statutes list a number of criminal offenses; if a person has been convicted of any of them, they are prohibited from obtaining employment in certain professions.
- This bill differed in a number of important ways from the barrier crimes bill, SB 1243, that the Crime Commission reviewed in 2011.

Senate Bill 353



- Senate Bill 1243 (2011) involved rewriting only Virginia Code sections 37.2-314, 37.2-408.1, and 63.2-1719.
 - It rewrote them by listing specific offenses, line by line, referring to them by statute number.
- Senate Bill 353 also rewrote Virginia Code sections 32.1-126.01 and 32.1-162.9:1, using the same approach.

Senate Bill 353



- Senate Bill 353 deleted Va. Code § 63.2-1719 entirely; every cross-reference to this important Code section then added a lengthy list of barrier crimes.
 - This resulted in a much lengthier bill.
 - It might be a simpler approach to keep a long list of barrier crimes in Va. Code § 63.2-1719, and then exempt certain offenses from the other Code sections, as is done with Va. Code § 37.2-314 and its cross-references.

Senate Bill 353



- Senate Bill 1243 (2011) did not attempt to make any substantive changes to the law.
- Senate Bill 353 did make some substantive changes to the exemptions allowed under certain of the Code provisions.
 - For example, it expanded the list of crimes that do not permanently prevent a person from providing kinship foster care, pursuant to Va. Code § 63.2-901.1(F).

Senate Bill 353



- Senate Bill 353 also added some offenses to the list of barrier crimes:
 - Penetration of the mouth of a child with lascivious intent, as set out in Va. Code § 18.2-370.6; and,
 - Causing or encouraging acts rendering children delinquent, as set out in § 18.2-371, when such acts result in a criminal homicide...such that the person is required to register as a sex offender.

Background



- Virginia currently has several separate and distinct barrier crime statutes which prohibit employment in various fields related to health care and mental health, and which prohibit serving as a foster parent or working with children in a similar type capacity.
- These statutes consist of long lists of criminal offenses; other statutes which prohibit employment or volunteering may then refer to a person “convicted of any offense listed in” one of these barrier crime statutes.

Background



- There are two identical barrier crime statutes in Title 32.1 (Health) of the Virginia Code.
- Va. Code § 32.1-126.01 lists offenses which prohibit employment, but not volunteering, at licensed nursing homes.
- Va. Code § 32.1-162.9:1 lists offenses which prohibit employment, but not volunteering, at licensed home care organizations and licensed hospices.
- No other statutes reference either of these lists.

Background



- There are two identical barrier crime statutes in Title 37.2 (Behavioral Health and Developmental Services) of the Virginia Code.
- Virginia Code § 37.2-314 lists offenses which prohibit employment at a state mental health facility or accepting a position that involves handling funds.
- Virginia Code § 37.2-408.1 lists offenses which prohibit employment or volunteering at a children's residential facility that is regulated or operated by the Department.

Background



- This list of crimes is referenced in two Code sections:
 - Va. Code § 37.2-416, which requires background checks for applicants who accept employment, in a direct consumer care position, by licensed mental health providers; and,
 - Va. Code § 37.2-506, which requires background checks for applicants who accept employment, in a direct consumer care position, by community service boards.
- Both of these sections then have a list of crimes that are “exceptions” to the longer, referenced list.
 - It must still be determined that the applicant is rehabilitated.

Background



- There is one barrier crimes statute in Title 63.2 (Welfare/Social Services) of the Virginia Code.
- This statute, Va. Code § 63.2-1719, does not refer to any specific kinds of employment or volunteering; instead, it contains a definition of “barrier crimes.”
 - This definition is then referenced in multiple Code sections all throughout Title 63.2, as well as in one section in Title 22.1 (Education) and Title 15.2 (Local Ordinances—child care services and facilities).
 - This list of barrier crimes applies to assisted living facilities, foster care applicants, child welfare agencies, family day homes, nursery school programs, etc.

Background



- All of these barrier crime statutes are written in a style that can be difficult to read.
- Instead of giving complete listings of offenses, they at times refer to broad sections of Title 18.2.
 - Example: “assaults and bodily woundings as set out in Article 4 (§ 18.2-51 et seq.) of Chapter 4 of Title 18.2;” “sexual assault as set out in Article 7 (§ 18.2-61 et seq.) of Chapter 4 of Title 18.2.”
- At the other times, they list specific Code sections, or portions of a Code section.
 - Example: “possession of child pornography as set out in § 18.2-371.1:1.”

Strengths and Weaknesses



- Strengths of having the barrier crimes statutes written in terms of broad categories:
 - If a new Code section is inserted into an Article, it will automatically be incorporated into the list of barrier crimes.
 - This can also be a weakness, if it is an inappropriate or minor offense that should not serve as a barrier to employment.
 - It is more concise than listing many Code sections and offenses.

Strengths and Weaknesses



- Weaknesses of having the barrier crimes statutes written in broad categories:
 - It can be difficult to tell at a glance if someone is prohibited from employment, even if their conviction history is known.
 - Ambiguities arise, leading agencies to make “judgment” calls that should be made by the legislature.

Strengths and Weaknesses



- Examples of ambiguities:
 - “arson as set out in Article 1 (§ 18.2-77 et seq.) of Chapter 5 of Title 18.2.”
 - Clearly this includes even the Class 4 misdemeanor of carelessly setting brush on fire.
 - Does it include the Class 2 misdemeanor of setting off a smoke bomb in violation of Va. Code § 18.2-87.1?
 - Does it include the Class 5 felony of making a bomb threat (no fire or explosives involved) in violation of Va. Code § 18.2-83?

Strengths and Weaknesses



- Strengths of having barrier crimes listed out, offense by offense, in detail:
 - It very clearly indicates what is a barrier crime, and what is not.
 - Easy for laypersons to read and understand.
 - Greatly reduces ambiguities.

Strengths and Weaknesses



- Weaknesses of having barrier crimes listed out, offense by offense, in detail:
 - If a new Code section is added to Title 18.2, it is not automatically incorporated into the list of barrier crimes;
 - If a new subsection is added to an existing Code section, it can result in an inappropriate or minor offense becoming a barrier to employment; and,
 - If a specific Code section is listed, but is referenced with additional language, ambiguities can still arise, or worse, a serious crime may be excluded from the list.

Strengths and Weaknesses



- Example of an inadvertent omission or ambiguity occurring in a specifically listed Code section:
 - “possession of child pornography as set out in § 18.2-374.1:1,”
 - Does this include intentionally operating an Internet website for the purpose of facilitating payment for access to child pornography, under Va. Code § 18.2-374.1:1(D)?
 - Under this subsection, the defendant never possessed, reproduced, transmitted, or even saw child pornography.

Policy Considerations



- Should the barrier crimes statutes be rewritten?
 - If so, should they be written:
 - Using broad categories, but eliminating ambiguities where possible?
 - All felonies found in Article 1 of Chapter 5; all felonies and all Class 1 misdemeanors found in Article 7 of Chapter 4?
 - Using detailed lists of specific offenses, with relevant statute numbers?
 - A combination of the two methods?
 - All felonies found in Article 1 of Chapter 5, and the following specific misdemeanors...?



Discussion
