

Virginia State Crime Commission

Barrier Crimes

2014

Barrier Crimes

Executive Summary

Senate Bill 353 was introduced by Senator John Edwards during the Regular Session of the 2014 General Assembly. The main purpose of the bill was to rewrite several of Virginia’s barrier crimes statutes. Barrier crimes are specific crimes, convictions for which result in the defendant becoming ineligible for certain kinds of employment or volunteering, or serving as a foster or adoptive parent. Currently, the statutes which list out the barrier crimes are written in a style that is difficult to read; instead of listing all of the offenses individually, they frequently refer to various categories of offenses found in specific Articles and Chapters of Title 18.2 of the Code of Virginia—for example, “sexual assault as set out in Article 7 (§ 18.2-61 *et seq.*) of Chapter 4 of Title 18.2.” For a layperson who is not familiar with looking up offenses in the Code of Virginia, it can be difficult to ascertain which crimes are, and which crimes are not, barrier crimes. Another difficulty with having the barrier crimes statutes written in this style is that subsequent additions to a given Article in Title 18.2 may result in a minor offense inadvertently becoming a prohibition to employment. Also, serious offenses may be left out of the barrier crimes list, or a state agency may be forced to make a judgment call on whether a serious conviction counts as a barrier crime, a function that should be left to the legislature.

To avoid ambiguities, Senate Bill 353 proposed to rewrite the barrier crimes statutes by listing all of the disqualifying offenses by statute number, with a brief description of the offense; e.g., “Capital murder, as set out in § 18.2-31; First or second degree murder, as set out in § 18.2-32; Murder of a pregnant woman, as set out in § 18.2-32.1.” However, this style still presents difficulties. If the written description does not fully capture all of the offenses contained in a Code section, then that offense would no longer be a barrier crime. For instance, if the rewritten statute lists as a barrier crime “Malicious bodily injury to a law-enforcement officer, as set out in § 18.2-51.1,” then unlawful bodily injury to a law-enforcement officer in violation of § 18.2-51.1 would not be a barrier crime. Extreme care would need to be taken to ensure there was complete accuracy in the description of the offenses if this style were adopted by the legislature. And, there would still be the risk that if a statute were modified in the future with the addition of a new offense, that new offense would not be covered.

There are two other styles in which the barrier crimes statutes could be rewritten. One would be to simply list out all of the statute numbers, without providing descriptions of the offenses. This approach still creates problems, though. If a statute contains within it a minor or innocuous offense, listing the statute number would mean that the minor offense would become a barrier crime. If a written exception were made to exclude the minor offense, then this approach would essentially be a variation of Senate Bill 353 and would still pose all of the problems inherent with that approach.

The other style that could be used would be to list broad categories of crimes, without making any reference to the Code of Virginia. For instance, “any felony assault crime; robbery; carjacking; any crime of burglary; any felony crime involving the distribution of a controlled substance; etc.” This approach would be easy for laypersons to read and apply, ambiguities would be minimal, and any interpretations that would need to be made by employers or state agencies should be no more

difficult than the current requirement that convictions from other states also be considered to see if they are “similar” to any of the Virginia crimes listed in the barrier crimes statutes.

At its December meeting, the Commission was presented with three options of how Virginia’s barrier crimes statutes could be rewritten:

Policy Option 1: Rewritten using only Code sections or statute numbers, with minimal extra wording.

Policy Option 2: Rewritten by listing out all of the Code sections, with specific descriptions of the offenses included with the statute numbers. [This option is the style that is used in SB 353].

Policy Option 3: Rewritten using broad descriptions of categories of offenses, without specific reference to either Code sections, or specific Articles and Chapters in the Code of Virginia.

After consideration, the Crime Commission made no motions on any of these options, and had no recommendations on the subject of rewriting Virginia’s barrier crimes statutes.

Background

Senate Bill 353 (SB 353) was introduced by Senator John Edwards during the Regular Session of the 2014 General Assembly.¹ The bill was amended in the nature of a substitute in the Senate Rehabilitation and Social Services Committee, and passed by the Senate. It was then referred to the House Courts of Justice Committee, where it was left in Committee. A letter request was sent by the Committee to the Crime Commission, requesting that the bill be reviewed.

The focus of SB 353 was to reorganize various barrier crimes statutes throughout the Code of Virginia. Barrier crimes statutes are statutes which list a number of offenses; a conviction for any one of the listed offenses serves as a “barrier” to various types of employment. There are slightly different lists for different kinds of employment. Some of the barrier crimes statutes also apply to volunteer opportunities, or the ability to serve as a foster parent or to adopt children. The barrier crimes statutes that were the subject of SB 353 are all lengthy, containing many offenses, and are difficult to read. The object of SB 353 was to simplify the lists by reorganizing them, and enumerating the offenses in a different way—listing all of the crimes by statute number, preceded by a verbal description of the offense; e.g. “Felony homicide, as set out in § 18.2-33.” This differs from the current way in which these statutes are written—in general, the lists of offenses are referred to by Article and Chapter numbers in Title 18.2, and are given in terms of broad subject matter categories; e.g., “sexual assault as set out in Article 7 (§ 18.2-61 *et seq.*) of Chapter 4 of Title 18.2.” However, it should be noted that the current statutes also refer to some specific offenses by statute number, e.g., “abduction as set out in subsection A or B of § 18.2-47.”

The Crime Commission previously studied the issue of rewriting Virginia’s barrier crimes statutes in 2011, in response to Senate Bill 1243 (2011), which was also introduced by Senator Edwards.² At the conclusion of the 2011 study, the Crime Commission made no motions and had no recommendations on the advisability of rewriting the barrier crimes statutes in a manner designed to make them easier to read.

The 2011 bill (SB 1243) differed from the current bill, SB 353, in a number of key aspects. Senate Bill 1243 only dealt with rewriting three Code sections: Va. Code §§ 37.2-314, 37.2-408.1, and 63.2-1719. Senate Bill 353 dealt with these Code sections, but also rewrote two additional statutes: Va. Code §§ 32.1-126.01 and 32.1-162.9:1. While SB 1243 ostensibly was drafted to make no substantive changes to the law, SB 353 did make a few substantive changes, and thus went beyond merely rewriting the list of crimes in each statute in a new manner. In SB 353, the list of exemptions for some of the statutes was modified; as an example, subsection F of Va. Code § 63.2-901.1 under current law specifies that even if an individual has been convicted of a felony drug possession offense, or a misdemeanor arson offense—both of which are barrier crimes pursuant to Va. Code § 63.2-1719—he will not be barred from serving as a kinship foster care parent, provided ten years have elapsed from the date of conviction.³ This list of exemptions was expanded in SB 353. Senate Bill 353 also added a few new offenses to each of the barrier crimes statutes, such as penetrating the mouth of a child with a lascivious kiss in violation of § 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, as set out in subsection C of § 9.1-902, such that the person is required to register [as a sex offender].”

The other large difference between SB 1243 and SB 353 is that SB 353 would have completely deleted Va. Code § 63.2-1719 from the Code of Virginia, and in its place, inserted that list of crimes into every statute in the Code which is currently cross-referenced with Va. Code § 63.2-1719. This resulted in SB 353 being a much lengthier bill than SB 1243, for instead of having one lengthy list of crimes contained in Va. Code § 63.2-1719, there were multiple, identical lengthy lists of those crimes.

Options for Rewriting Virginia’s Barrier Crimes Statutes

The current style in which the barrier crimes statutes are written is to refer to broad sections of Title 18.2, rather than listing out all of the crimes individually. As an example, instead of listing the felony crimes of unlawful wounding or bodily injury, malicious wounding or bodily injury, malicious bodily injury to a law-enforcement officer, aggravated malicious wounding, throwing an object from a place higher than one story, strangulation, etc., the barrier crimes statutes typically refer to “assaults and bodily woundings as set out in Article 4 (§ 18.2-51 *et seq.*) of Chapter 4 of Title 18.2.”⁴ Similarly, instead of listing out the felony sexual assault crimes of rape, forcible sodomy, object sexual penetration, aggravated sexual battery, carnal knowledge, etc., the statutes refer to “sexual assaults as set out in Article 7 (§ 18.2-61 *et seq.*) of Chapter 4 of Title 18.2.”⁵ While a few offenses are listed individually, such as “possession of child pornography as set out in § 18.2-371.1:1,”⁶ the vast majority of crimes that are included in the statutes are referred to via their Article and Chapter numbers, with a brief description of the type of offense.

There are a number of advantages to listing out the offenses in this manner. The barrier crimes statutes themselves are much shorter than if all of the offenses were written out. Referring to “all of the assaults and bodily woundings as set out in Article 4,” takes much less space in the Code of Virginia than proceeding to list the twenty or so assault offenses that are included in Article 4. The other advantage to writing out the barrier crimes statutes in this way is that new crimes automatically become incorporated into the barrier crimes list. When the crime of strangulation, in violation of Va. Code § 18.2-51.6, was added to Title 18.2 in 2012, it immediately was a barrier crime, without any of the barrier crimes statutes having to be amended.⁷

There are also disadvantages to listing the barrier crimes offenses by means of broadly referring to all offenses, or all relevant offenses, in given Articles and Chapters of Title 18.2. It can be difficult to tell quickly if a given criminal conviction qualifies as a barrier offense, especially when a non-attorney is reviewing a criminal history record, and is not familiar with using the Code of Virginia. Even worse, ambiguities can arise, as serious offenses can be included in a given Article or Chapter of Title 18.2, but do not meet the description provided in the barrier crimes statute. By way of illustration, it is a barrier crime to be convicted of “arson as set out in Article 1 (§ 18.2-77 *et seq.*) of Chapter 5 of Title 18.2.”⁸ Included in Article 1 of Chapter 5 of Title 18.2 is the Class 2 misdemeanor of setting off a smoke bomb, in violation of Va. Code § 18.2-87.1. Should this offense be considered a barrier crime? An even more serious offense in Article 1 of Chapter 5 of Title 18.2 is the Class 5 felony of making a bomb threat, in violation of Va. Code § 18.2-83. Strictly speaking, bomb threats are not arson crimes. Therefore, should making a bomb threat qualify as a barrier offense? Ambiguities of this nature lead to employers and state agencies having to make judgment calls that should be made by the legislature. The last inherent disadvantage of listing barrier crimes by reference to Article and Chapter numbers is that it becomes all too easy for a minor offense to inadvertently become a barrier crime when it is present or is added to a given Article in Title 18.2. One example that is frequently given is the Class 4 misdemeanor of carelessly setting brush on fire, in violation of Va. Code § 18.2-88. This arson offense is located in Article 1 of Chapter 5 of Title 18.2, and therefore is undeniably a barrier crime, per the definition given.⁹ The result is that people who were convicted decades ago of throwing a lit cigarette out of a moving car onto the shoulder of a public highway may find themselves unable to work in a child day care center, for example.¹⁰ The style in which the barrier crimes are written in SB 353 (and in SB 1243) is to list all of the criminal statutes individually, with a brief description of the offense given before the statute number. For example, “Capital murder, as set out in § 18.2-31; First or second degree murder, as set out in § 18.2-32; Murder of a pregnant woman, as set out in § 18.2-32.1; [etc].”¹¹ Writing the barrier crimes in this way has the advantage of more clearly identifying which crimes are barrier crimes and which are not, making the statute easier for laypersons to read and understand. Ostensibly, this style also avoids creating ambiguities, which is another benefit. However, there are a number of disadvantages of writing out the barrier crimes in this manner. If a new criminal statute is placed in Title 18.2, it does not automatically become a barrier crime, unless the new statute is also inserted into the barrier crimes statute. On the other hand, if a new crime is inserted into an existing statute, it could result in a minor offense suddenly becoming a bar to employment or becoming a foster or adoptive parent. For instance, if a new Class 4 misdemeanor were added to a statute that is listed as a barrier crime, the new misdemeanor might become a barrier crime in its own right, even if that was not the specific intent of the legislature.

The main disadvantage of writing out the barrier crimes in the manner proposed by SB 353 and SB 1243 is that the brief descriptions of the offenses provided before the statute numbers have the potential to inadvertently exclude some serious offenses from being barrier crimes. For example, SB 353 includes as a barrier crime, “Malicious bodily injury to law-enforcement officers, firefighters, search and rescue personnel, or emergency medical service providers, as set out in § 18.2-51.2.”¹² Because of the descriptive preface, this language would mean that the serious offense of unlawful bodily injury to a law-enforcement officer, firefighter, etc., would not be a barrier crime, even though it is also contained in Va. Code § 18.2-51.2. Inadvertent omissions are even more likely to occur, however, when a serious crime is incorporated as a subsection into an existing Code section, but is qualitatively different from the other offense or offenses in that section. As an example, SB 1243 listed as a barrier crime “Possession of child pornography, as set out in § 18.2-374.1:1.”¹³ This language would exclude as a barrier crime the Class 4 felony of operating an Internet website for the purposes of facilitating payment to access child pornography, as defined by

subsection D of that statute.¹⁴ If Virginia’s barrier crimes statutes are to be written in a style that includes both a statute number and a brief descriptive preface, extreme care must be taken to make sure the descriptive preface is both accurate and completely covers all of the offenses within the statute that are meant to be barrier crimes. Subsequent modifications to a statute by the legislature in later years will greatly increase the chances that an inadvertent omission or inclusion will occur.

Two other possible options for writing the barrier crimes statutes should be mentioned. One would be to have a statute that simply lists out a lengthy series of statute numbers, with no descriptions included. The difficulty with this approach is that if any statute contains a minor offense that should not be a barrier crime, that minor offense would be included as a barrier crime, unless a written exclusion was added. However, once written exclusions start to be added to the list, the barrier crimes statute would essentially become a variation of the ones proposed by SB 1243 and SB 353.

The other option for writing a barrier crimes statute would be to focus on broad categories of criminal offenses, without referencing specific Articles and Chapters in Title 18.2. For example:

“Barrier crime” means a conviction of any offense involving: a felony violation of a protective order, murder or manslaughter; felony assault or unlawful or malicious bodily injury or wounding; misdemeanor assault; felony abduction; any felony offense involving a firearm or other weapon; robbery; extortion; any felony offense involving the making or communicating of a threat; any felony offense involving the possession of explosive, radiological, infectious biological, or other toxic materials; any felony offense involving arson; felony stalking; sexual assault; any felony offense involving prostitution or pandering; any felony offense involving consensual sexual activity with a minor or indecent liberties; incest or bestiality; child pornography; any felony offense involving the abuse and neglect of a minor or an incapacitated adult; burglary or any offense involving felony trespass; any offense involving employing or permitting a minor to assist in an act which would be a violation of an obscenity law; any felony offense involving the manufacture, possession, distribution or attempt to obtain a controlled substance or marijuana; any felony offense involving a prisoner or incarcerated person.

Using this approach, the statute would not be overly lengthy, would avoid most ambiguities, and would not run the risk of accidentally including or omitting new offenses in later years due to amendments made to Title 18.2. Arguably, employers and state agencies would have less need to make judgment calls when presented with these broad categories, than they would when considering the current statutory language. Any judgment calls they would need to make would be no greater than what is inevitably required when a barrier crimes statute includes “or an equivalent offense in another state.”¹⁵

Summary

In 2011, while reviewing SB 1243, the Crime Commission was presented with the issue of whether or not some of Virginia’s barrier crimes statutes should be rewritten, in order to make them easier to read. At that time, the Commission made no motions and took no positions on the subject. In 2014, this same issue of whether or not the lengthy barrier crimes statutes in the Code of Virginia should be rewritten, was again presented to the Crime Commission for their consideration.

At its December meeting, the Commission was presented with three options of how Virginia’s barrier crimes statutes could be rewritten:

Policy Option 1: Rewritten using only Code sections or statute numbers, with minimal extra wording.

Policy Option 2: Rewritten by listing out all of the Code sections, with specific descriptions of the offenses included with the statute numbers. [This option is the style that is used in SB 353].

Policy Option 3: Rewritten using broad descriptions of categories of offenses, without specific reference to either Code sections, or specific Articles and Chapters in the Code of Virginia.

After consideration, the Crime Commission made no motions on any of these options, and had no recommendations on the subject of rewriting Virginia’s barrier crimes statutes.

¹ S.B. 353, 2014 Gen. Assemb., Reg. Sess. (Va. 2014).

² S.B. 1243, 2011 Gen. Assemb., Reg. Sess. (Va. 2011).

³ VA. CODE ANN. § 63.2-901.1(F) (2014).

⁴ VA. CODE ANN. § 63.2-1719 (2014).

⁵ Id.

⁶ Id.

⁷ 2012 Va. Acts chs. 577, 602.

⁸ VA. CODE ANN. § 63.2-1719 (2014).

⁹ Id.

¹⁰ VA. CODE ANN. § 63.2-1725 (2014).

¹¹ *Supra* note 1.

¹² *Supra* note 1.

¹³ *Supra* note 2.

¹⁴ Someone can be guilty of this serious offense, without ever being in possession of child pornography, as the gravamen of the offense is financial. This oversight in the description of Va. Code § 18.2-374.1:1 was corrected in SB 353, where the description was changed to “Possession, reproduction, distribution, or facilitation of child pornography, as set out in § 18.2-374.1:1.” *Supra* note 1.

¹⁵ VA. CODE ANN. § 63.2-1719 (2014). Whenever a barrier crimes statute includes “equivalent offenses from another state,” interpretations will become necessary. For example, would a statute from another state that makes it a felony to trespass in a residence, be equivalent to one of our burglary statutes? What if the statute included all of the elements of one of our burglary statutes, but was a misdemeanor? Interpretations can never be completely eliminated, if a barrier crimes statute is to be effective, include more than a handful of offenses, and have as a component the requirement that its offenses be compared with those of other states.