

# Virginia State Crime Commission

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## Restrictions on Sex Offenders

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2007

## RESTRICTIONS ON SEX OFFENDERS

During the 2007 session of the Virginia General Assembly, Delegates Mamyé BaCote and John Cosgrove both introduced bills that sought additional restrictions on convicted sex offenders. House Bill 2175, introduced by Delegate BaCote, sought to prohibit sex offenders from loitering within 100 feet of any place he knows or has reason to know is a day-care center, to include publicly operated recreation or community centers. Currently, sex offenders are prohibited from loitering within 100 feet of a school or day care center. Delegate Cosgrove's bill, House Bill 2404, attempted to increase the distance from schools and day care centers, within which sex offenders may not reside, from 500 feet to 1,000 feet. The House Courts of Justice Committee was unable to determine the legality or impact of both bills, so both bills were left in committee. The House Courts of Justice Committee referred, by letter, both bills to the Crime Commission for further study.

In order to comply with the study request, the Commission staff reviewed applicable law from both the United States Supreme Court and a number of states that have living restrictions for convicted sex offenders.

The most significant constitutional issue for any sex offender legislation is whether the restrictions violate the Ex Post Facto clause of the United States Constitution. Courts will specifically determine if the legislature intended to make the new restrictions a criminal punishment, or if there was a civil, non-punitive intention for the restrictions. There is no Ex Post Facto issue with the current restrictions in § Va. Code 18.2-370.2 (loitering) or 18.2-370.3 (residence restriction) since they are part of the punishment for committing the actual criminal act. They are not applied retroactively, so the statutes fall outside of Ex Post Facto analysis. HB 2175 is consistent with the current statutory structure and has no Ex Post Facto issues. HB 2404, however, is applied retroactively, which could lead to an Ex Post Facto challenge.

There is also a possibility that future restrictions could violate the Eighth Amendment prohibition against cruel and unusual punishment if the restrictions force offenders to move out of the state. The Virginia Supreme Court has stated, in dicta, that punishment which forces individuals to leave the state would amount to banishment.

Under Virginia law, there are no issues for extending the living restrictions for sex

offenders, described in HB 2404. There are, however, problems with HB 2175. Specifically, the bill uses the terms "publicly operated recreation center" and "community center." Neither term is defined in the Code of Virginia or by case law. This could cause a great deal of confusion on what actually constitutes a "recreation" or "community" center, to the point that it could be considered unconstitutionally vague. Each term is also further modified by the term "serving children." Again, this term is undefined by law and could lead to confusion. Any future version of HB 2175 should include definitions for "community" and "recreation" center and "serving children."

Aside from legal issues, there are some practical problems with increasing residency restrictions that have recently come to the attention of state officials in Florida and California. In Florida, 16 convicted sex offenders were living under a highway bridge, with state approval, because there was no other place for them to live. In California, sex offenders have been avoiding the 2000 foot living restriction by declaring themselves homeless. Since that law took effect in November of 2006, there was a 27% increase in offenders reporting no permanent address by the fall of 2007. These news reports highlight the potential, significant social ramifications of living restrictions. To date, the problems illustrated by the news stories have not been studied extensively by academics or social scientists, since most of the living restrictions have been enacted only recently around the country.

The Commission declined to pursue any legislation regarding living restrictions for convicted sex offenders.

