

**REPORT OF THE
VIRGINIA STATE CRIME COMMISSION**

**Use of a Communication System to
Facilitate Offenses Involving
Children**

**TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA**



REPORT DOCUMENT NO. 278

**COMMONWEALTH OF VIRGINIA
RICHMOND**

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Attachment A: Senate Bill 1169 (Engrossed) (2005)

I. Authority for Study

The *Code of Virginia*, § 30-156, authorizes the Virginia State Crime Commission (“Crime Commission”) to study, report and make recommendations “on all areas of public safety and protection.” Additionally, the Crime Commission is to study “compensation of persons in law enforcement and related fields” and to study “apprehension, trial and punishment of criminal offenders.”¹ Section 30-158(3) empowers the Crime Commission to “conduct studies and gather information and data in order to accomplish its purposes as set forth in § 30-156. . . and formulate its recommendations to the Governor and the General Assembly.”

Using the statutory authority granted to the Crime Commission, staff conducted a study on *Code of Virginia* § 18.2-374.3 to see if any modifications should be made to the statute.

II. Executive Summary

During the 2005 Session of the Virginia General Assembly, the House Courts of Justice Committee referred the engrossed version of Senate Bill 1169 to the Crime Commission for an analysis of the proposed legislation and the statute which it would modify, *Code of Virginia* § 18.2-374.3.²

This statute was originally passed in 1992 and was amended in 1999. The statute in its current form has many cross-references to other Code sections. Although difficult to read, its two subsections are not inconsistent with each other.

Recommendation

Rewriting *Code of Virginia* § 18.2-374.3 to enhance its clarity should be considered in the future, perhaps through dividing the statute into further subsections or splitting the offenses contained therein into multiple statutes. However, it is not desirable to substantively change any of the statute’s provisions, and the proposal in the engrossed version of Senate Bill 1169 should not be adopted.

III. Methodology

Staff reviewed the legislative history of *Code of Virginia* § 18.2-374.3, and traced how the statute was amended over the years. The statute in its current form was closely analyzed, to determine the various types of conduct which it criminalizes.

The various offenses, and their punishments, were presented to a Criminal Law Sub-Committee of the Crime Commission for consideration. The Sub-Committee

¹ VA. CODE ANN. § 30-156 (Michie 2004).

² See Attachment A.

reviewed the offenses and their possible penalties, and recommended to the Crime Commission that the substantive offenses contained in the statute not be changed.

IV. Background

Legislative History

Code of Virginia § 18.2-374.3 was originally passed in 1992.³ In its initial form, it was a short, one paragraph statute that was aimed at criminalizing solicitations for child pornography:

It shall be unlawful for any person to use a communications system, including but not limited to computers or computer networks or bulletin boards, or any other electronic means for the purposes of promoting the use of a minor for any activity in violation of § 18.2-374.1.⁴ A violation of this section shall be punishable as a Class 6 felony.⁵

The statute was amended in 1999.⁶ The first paragraph was expanded by adding the term “procuring” to the existing word “promoting.” More significantly, a second statute, *Code of Virginia* § 18.2-370, was referenced alongside *Code of Virginia* § 18.2-374.1. Henceforth, the statute would criminalize procuring the use of a minor, not just for purposes of producing child pornography, but also for any act of indecent liberties.⁷ A second paragraph was then added, applying only to conduct by adults. This paragraph criminalizes the solicitation of a minor for various sexual purposes. The full statute that was passed in 1999 read as follows:

A. It shall be unlawful for any person to use a communications system, including but not limited to computers or computer networks or bulletin boards, or any other electronic means for the purposes of procuring or promoting the use of a minor for any activity in violation of § 18.2-370 or § 18.2-374.1. A violation of this subsection is a Class 6 felony.

B. It shall be unlawful for any person over the age of eighteen to use a communications system, including but not limited to

³ 1992 Va. Acts ch. 699.

⁴ *Code of Virginia* § 18.2-374.1 criminalizes all aspects of manufacturing, attempting to manufacture, and distributing child pornography.

⁵ A Class 6 felony carries a penalty of up to 5 years imprisonment. VA. CODE ANN. § 18.2-10 (Michie 2005).

⁶ 1999 Va. Acts ch. 659.

⁷ *Code of Virginia* § 18.2-370 is Virginia’s indecent liberties statute. It criminalizes adults who solicit minors for sexual purposes. In 1999 it only applied to minors who were under the age of 14. In 2000, the age was raised so the statute would apply to the solicitation of minors under the age of 15. 2000 Va. Acts chs. 185, 762. Note that because *Code of Virginia* § 18.2-374.3 directly references the indecent liberties statute, it was also affected by the 2000 change to *Code of Virginia* § 18.2-370.

computers or computer networks or bulletin boards, or any other electronic means, for the purposes of soliciting any person he knows or has reason to believe is a minor for (i) any activity in violation of §§ 18.2-355, 18.2-358, 18.2-361 or § 18.2-370, (ii) any activity in violation of § 18.2-374.1, or (iii) a violation of § 18.2-374.1:1. As used in this subsection, “use a communications system” means making personal contact or direct contact through any agent or agency, any print medium, the United States mail, any common carrier or communication common carrier, any electronic communications system, or any telecommunications, wire, computer, or radio communications system. A violation of this section shall be punishable as a Class 5 felony.⁸

In 2003 two non-substantive changes were made to the statute: the word “eighteen” was replaced with the numeral, “18;” and the word “minor” was replaced with the phrase “child less than 18 years of age.”⁹

The statute was last amended in 2004,¹⁰ when one of the criminal offenses cross-referenced in the second subsection was changed to limit its scope. The statute had read, in relevant part:

B. It shall be unlawful for any person over the age of eighteen to use a communications system. . . for the purposes of soliciting any person he knows or has reason to believe is a minor for (i) any activity **in violation of... § 18.2-370**.... [Emphasis supplied].

The statute was changed to read:

B. It shall be unlawful for any person over the age of eighteen to use a communication system... for the purposes of soliciting any person he knows or has reason to believe is a minor for... any activity **in violation of subsection A of § 18.2-370**. [Emphasis supplied].

⁸ A Class 5 felony carries a penalty of up to 10 years imprisonment. VA. CODE ANN. § 18.2-10 (Michie 2005).

⁹ 2003 Va. Acts chs. 935, 938.

¹⁰ 2004 Va. Acts chs. 414, 444, 459, 864. A few non-substantive changes were also made. The word “minor” in subsection B was changed to the phrase “child less than 18 years of age;” the phrase in subsection B, “any person over the age of eighteen,” was changed to “any person 18 years of age or older;” and the sentences at the end of each subsection that began, “A violation of this section,” were corrected to read, “A violation of this subsection.”

Analysis of current statute

Code of Virginia § 18.2-374.3 contains seven cross-references that create eight different crimes—three in subsection A, and five in subsection B. Subsection A ostensibly applies to all persons, but only if they use a “communications system.” Subsection B consists of crimes that can only be committed by adults, but is more extensive in its modes of transmission, including not just “communications systems,” but also “any agent or agency, any print medium, the United States mail, [and] any common carrier or communication common carrier.”

Subsection A prohibits “any person,” even a minor, from using a communications system to “procure or promote the use of a minor” for any activity in violation of *Code of Virginia* § 18.2-370, which is the crime of indecent liberties,¹¹ or in violation of *Code of Virginia* § 18.2-374.1, which criminalizes the production, distribution, or financing of child pornography, or the solicitation of children to appear in child pornography.

Indecent liberties is a crime which can only be committed by an adult. A minor can never be convicted under the indecent liberties statute. Therefore, while subsection A of *Code of Virginia* § 18.2-374.3 does not have an explicit minimum age requirement as to the offender, it does have one by default if the crime is using a communications system to solicit a minor in violation of the indecent liberties statute. The wording of the statute makes clear that, just as a minor cannot be found guilty of indecent liberties, so a minor cannot be found guilty of a violation of subsection A of *Code of Virginia* § 18.2-374.3 if he or she used a communication system to directly solicit another minor for sexual activities. If a minor did use a communication system to solicit another minor to appear in child pornography, he could be charged under subsection A of *Code of Virginia* § 18.2-374.3, not because the indecent liberties statute is applicable, but because the child pornography statute is—there is no minimum age requirement for a defendant in *Code of Virginia* § 18.2-374.1, the child pornography statute.

In summary, subsection A of *Code of Virginia* § 18.2-374.3 makes it a crime for anyone, adult or juvenile, to solicit or “promote” a juvenile to appear in or be involved with child pornography. And, it makes it a crime for an adult to solicit a juvenile for a sexual act. It does not make it a crime for a juvenile to solicit another juvenile for a sexual act, unless the first juvenile is actually working on behalf of an adult. A violation of this subsection is a Class 6 felony.¹²

Subsection B of *Code of Virginia* § 18.2-374.3 prohibits persons “over 18 years of age,” from making any contact with a “child less than 18 years of age” in order to solicit

¹¹ There are two subsections in the indecent liberties statute. The first subsection criminalizes any adult soliciting (for sexual purposes) or indecently exposing himself to a minor under the age of 15; this subsection is divided into four subdivisions, each one describing various sexual acts. The second subsection of the indecent liberties statute criminalizes any adult encouraging a minor, even one over the age of 15, from appearing in child pornography.

¹² A Class 6 felony carries a penalty of up to 5 years imprisonment. VA. CODE ANN. § 18.2-10 (Michie 2005).

him or her (1) for an abduction for the purposes of prostitution;¹³ or an act of sodomy;¹⁴ (2) to appear in or be involved with the production or distribution of child pornography;¹⁵ (3) to be involved with the possession of child pornography;¹⁶ or (4) for any of the sexual acts prohibited in subsection A of the indecent liberties statute.¹⁷ A violation of this subsection is a Class 5 felony.¹⁸

While *Code of Virginia* § 18.2-374.1 is referenced in both subsections of *Code of Virginia* § 18.2-374.3, this does not present a conflict. Rather, it appears the legislative intent is to make it a crime for either juveniles or adults to solicit minors for the purposes of producing child pornography, but to more severely penalize adults who do so (a Class 5 felony, as opposed to a Class 6 felony for juveniles).

Analysis of proposed change

The engrossed version of Senate Bill 1169 that was referred to the Crime Commission in 2005 would alter *Code of Virginia* § 18.2-374.3 by deleting in subsection A the cross-reference to *Code of Virginia* § 18.2-374.1.¹⁹ As discussed above, subsection A is the only subsection of *Code of Virginia* § 18.2-374.3 which applies to juveniles. Therefore, the effect of this change would be to decriminalize situations where juveniles solicit other juveniles, via a communications system, to appear in child pornography. It would still remain a crime under the statute if an adult were to solicit a child to appear in child pornography.²⁰ And, it would still be criminal conduct for a juvenile to engage in this activity. Even if the proposed bill were enacted into law, any juvenile who solicited another juvenile to appear in child pornography would be guilty of a violation of *Code of Virginia* § 18.2-374.1.

The deletion proposed by the engrossed version of Senate Bill 1169 would be a direct policy change by the Virginia legislature. From its inception in 1992, *Code of Virginia* § 18.2-374.3 was applicable to juveniles, as well as adults, who solicit child pornography by means of computers or other communications systems.

V. Conclusion and Recommendation

Code of Virginia § 18.2-374.3 is difficult to read and understand due to the large number of cross-references it contains. The legislature should consider, in the future,

¹³ A violation of *Code of Virginia* § 18.2-355.

¹⁴ A violation of *Code of Virginia* § 18.2-361.

¹⁵ A violation of *Code of Virginia* § 18.2-374.1.

¹⁶ A violation of *Code of Virginia* § 18.2-374.1:1

¹⁷ A violation of subsection A of *Code of Virginia* § 18.2-370.

¹⁸ A Class 5 felony carries a penalty of up to 10 years imprisonment. VA. CODE ANN. § 18.2-10 (Michie 2005).

¹⁹ *Code of Virginia* § 18.2-374.1 is the statute which criminalizes all aspects of manufacturing, attempting to manufacture, and distributing child pornography.

²⁰ Under the existing language of the statute, it would be a Class 5 felony. VA. CODE ANN. § 18.2-374.3(B)(iv) (Michie 2005).

rewriting the entire statute and simplifying its basic structure. Nevertheless, there are no inherent contradictions in the statute.

The Crime Commission reviewed the development of the statute, and the different types of conduct that it prohibits. They decided that no substantive amendments should be made to the statute at this time.

Recommendation

It is the recommendation of the Crime Commission that the engrossed version of Senate Bill 1169 which was proposed in 2005 not be adopted. While *Code of Virginia* § 18.2-374.3 could be rewritten in the future for clarity and ease of understanding, there is no need at the current time to make any substantive changes to its wording.

ATTACHMENT A

055498820

SENATE BILL NO. 1169

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Senate Committee for Courts of Justice
on January 31, 2005)

(Patron Prior to Substitute—Senator Stolle)

A *BILL to amend and reenact § 18.2-374.3 of the Code of Virginia, relating to use of communications systems to facilitate certain offenses involving children; penalties.*

Be it enacted by the General Assembly of Virginia:

1. That § 18.2-374.3 of the Code of Virginia is amended and reenacted as follows:

§ 18.2-374.3. Use of communications systems to facilitate certain offenses involving children.

A. It shall be unlawful for any person to use a communications system, including but not limited to computers or computer networks or bulletin boards, or any other electronic means for the purposes of procuring or promoting the use of a minor for any activity in violation of § 18.2-370 or § 18.2-374.1. A violation of this subsection is a Class 6 felony.

B. It shall be unlawful for any person 18 years of age or older to use a communications system, including but not limited to computers or computer networks or bulletin boards, or any other electronic means, for the purposes of soliciting any person he knows or has reason to believe is a child less than 18 years of age for (i) any activity in violation of § 18.2-355 or § 18.2-361, (ii) any activity in violation of § 18.2-374.1, (iii) a violation of § 18.2-374.1:1, or (iv) any activity in violation of subsection A or B of § 18.2-370. As used in this subsection, "use a communications system" means making personal contact or direct contact through any agent or agency, any print medium, the United States mail, any common carrier or communication common carrier, any electronic communications system, or any telecommunications, wire, computer, or radio communications system. A violation of this subsection is a Class 5 felony.

2. That the provisions of this act may result in a net increase in periods of imprisonment or commitment. Pursuant to § 30-19.1:4, the estimated amount of the necessary appropriation cannot be determined for periods of imprisonment in state adult correctional facilities and is \$0 for periods of commitment to the custody of the Department of Juvenile Justice.

SENATE

SUBSTITUTE

SB1169S1