



**Computer Crimes Definitions Advisory Committee**  
**Wednesday, September 22, 2010 10:00 a.m.**  
**General Assembly Building, 6th Floor, Speaker's Conference Room**

- Call to Order; Roll Call

Senator Janet D. Howell called the meeting to order.

- Introduction of Members

Members of the Committee introduced themselves, briefly explaining their backgrounds.

- Review of JCOTS & Role of Advisory Committee

JCOTS Staff reviewed the advisory committee process and the role of JCOTS in the General Assembly. A copy of the presentation is available on the JCOTS website at <http://jcots.state.va.us>.

- Computer Crimes Act Background

JCOTS staff presented a brief history of the Computer Crimes Act ("the Act"). JCOTS worked with the Virginia State Crime Commission in 2004 to draft the existing Act. The Act was crafted in a manner to avoid mention of specific technologies so as to remain effective and current even as new technologies emerged and existing technologies evolved and changed. The Act has not been amended significantly since 2004, except to update the law on spam emails.

Delegate Rob B. Bell III noted that the legislation he proposed last session, HB 920, was meant to clarify the definition of "computer" in the Act. This bill was referred to JCOTS for study, and provides an opportunity to ensure that the definition of "computer" is still up-to-date.

Committee members questioned the source of the definitions in the Act. Senator Howell recalled that Uniform Computer Information Transaction Act ("UCITA")



served as an important resource for the definitions in the Act. The General Assembly enacted UCITA in 2000.

- Review & Discussion of HB 920 (Bell, R.B.) and § 18.2-152.2 generally

Delegate Bell explained his motivation for proposing the legislation. He noted that the Code of Virginia, at § 18.2-427, provides for the punishment of obscenities spoken on the telephone. To the extent that someone is harassed by another using a computer, the computer harassment provisions in the Act may apply. Harrassing or obscene text messaging, though, does not necessarily fit neatly as either a computer crime, or as a telephone obscenity crime. Other forms of non-verbal information communicated to and from advanced cellular phones, such as emails, instant messages, and transcriptions of voice messages, might also call into question the applicability of the computer crimes statutes.

The Committee spent some time discussing the differences between the Act and the telephone obscenity statute, § 18.2-427. Under the Act, a successful prosecution for computer harassment requires proof that the message was sent from a computer. Under § 18.2-427 the crime arises when the victim receives the threat or obscenity on a phone. Accordingly, the computer crimes act could require more evidence for a successful prosecution than under § 18.2-427.

From a technology perspective, it would not be sufficient to clarify that a threat falls under the Act if it is transmitted via the Internet. Text messages are transmitted through a method known as "short code," which is distinct from the method used for emails or instant messaging. Even if a "smart phone" such as an iPhone or other Internet-enabled phone is used, the text message still is not transmitted via the Internet.

The Committee agreed that if the definition of computer were to be changed, it should be done in the interest of promoting clarity in the courts. Delegate Bell cited anecdotal evidence that judges may not be comfortable classifying cellular phones as computers for the purpose of prosecuting under the Act. Some members of the committee who are attorneys concurred and noted that judges who lack technical savvy may be reluctant to classify cellular phones as computers, while others may interpret the existing language to include cell phones.

A representative from the Attorney General's office noted that he had not encountered any problems in applying the definition of computer, though he had not sought to apply it to a cellular phone. He suggested that the proposed legislation might add some clarity by explicitly including cellular phone or wireless

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device in the definition of computer, although he reiterated that he did not see a problem with the existing language.

Members, however, questioned the best means of arriving at statutory clarity. Some discussion suggested that amending § 18.2-427 might provide the simplest means of assuring that obscene or threatening text messaging could be prosecuted. However, amending the definition of computer under the Act might give prosecutors and judges flexibility to bring charges under either the Act or § 18.2-427.

The Committee expressed great interest in avoiding unintended consequences from any possible amendment. Some members suggested that adding the terms “wireless device” or “cellular phone” to the definition of “computer” under the Act would have no unintended consequences. They reasoned that because cellular phones and wireless devices can already be construed as computers, the addition of these terms would neither broaden nor narrow the definition. Accordingly, the changes would not affect other portions of the Code.

Other members drew attention to § 18.2-60. Under this section, it is felony to communicate in writing a threat of death or bodily injury to person if the threat places the person in reasonable apprehension of the harm. The writing may be electronically transmitted to produce a visual or electronic message. The members wanted to ensure that amending the Act would not preclude using § 18.2-60 to prosecute serious threats sent via text messaging.

Senator Howell asked Stewart Petoe, Director of Legal Affairs for the Virginia State Crime Commission, to comment on the discussion. He indicated that the drafters of the Act in 2004 conscientiously worked to exclude telephones from the definition of computer. At that time, cellular phones were predominantly used for voice communication. Though text messaging existed in 2004, it was not as widespread as it is today. The drafters explicitly did not want to write the definition of computer so broadly that calculators and cell phones, as they existed in 2004, would have been included. A deliberate inclusion of cellular phones in the definition of computer, therefore, would represent a policy change and should be closely reviewed for unintended consequences. Though the definition of computer can be understood to include cellular phones, their deliberate inclusion could make previously innocuous activities clearly unlawful under the Act. For example, if someone were to have used another’s cell phone to send a message, and had not identified herself to the recipient, it might be considered forgery.

Some of these concerns, however, were hedged by the fact that the current definition of computer can be understood to include cellular phones. Also, Committee members indicated that federal courts may already interpret federal laws, in certain circumstances, to include cellular phones. A change in the



definition of computer in the Act to include cellular phones, therefore, might be seen as a potential alignment with similar federal law.

Discussion next turned to trying to determine what other types of devices, in addition to phones, might be captured by altering the definition of computer. Members noted that gaming systems, like Xbox and Nintendo Wii, connect to the Internet, can be used to send messages, and could be considered computers. Also, Members discussed the possible distinctions between wireless enabled versus wireless capable devices, as well as storage devices. Committee members with knowledge of federal law on the subject explained that all such devices could be considered computers.

- **Formulation of Work Plan and Direction to Staff**

Senator Howell noted that the Committee would not be able to arrive at a recommendation at this meeting. She directed to discussion to focus on what work might be done before the next meeting.

Delegate Bell requested that JCOTS staff examine the consequences, both statutory and practical, of changing the definition in the Act and alternatively amending § 18.2-427. Staff answered questions about the textual scope of a definition change and explained that any drafts would use language that focused on the bad acts committed, not on specific names for those acts or technologies employed.

Senator Howell requested that JCOTS staff send the Committee Members a summary of the talking points used to discuss the Act in 2004. She also asked JCOTS staff to work with Stewart Petoe at the Crime Commission on draft language. Senator Howell thanked everyone for their participation.

- **Adjournment**

The meeting was adjourned. The next meeting of the Advisory Committee will be on November 1, 2010 at 10:00 a.m.