



Impact Analysis on Proposed Legislation

Virginia Criminal Sentencing Commission

House Bill No. 1054

(Patron –Albo)

Date Submitted: 01/12/2004

LD #: 04-0894134

Topic: Non-forcible sodomy & fornication

Proposed Change:

The proposal repeals § 18.2-344 (fornication), and adds to the *Code of Virginia* § 18.2-361.1 (carnal knowledge in a public place) and § 18.2-387.1 (carnal knowledge in correctional facilities). Also amended are §§ 15.2-1724, 18.2-345, 18.2-346, 18.2-348, 18.2-356, 18.2-370, 18.2-370.1 and 18.2-371 related to territorial limits for police officers, lewd behavior, prostitution, indecent liberties with children and contributing to the delinquency of a minor.

The proposed legislation is, in part, a response to United States Supreme Court's decision in the Lawrence et al. v. Texas case. The existing statute for crimes against nature, §18.2-361, is not modified by this proposal. Instead a section is added that defines carnal knowledge by anus or mouth in a public place as a Class 6 felony (1-5 years).

The proposal adds carnal knowledge (as defined by § 18.2-63) in the definitions for the indecent liberties with children (§§ 18.2-370 and 18.2-370.1) and contributing to the delinquency of a minor (§ 18.2-371.) statutes. A new Class 1 misdemeanor (0-12 months) is added for carnal knowledge in a correctional facility. Prostitution offenses (§§ 18.2-346 & 18.2-348) are amended by the proposal to include the act of carnal knowledge by mouth or anus. No change to the existing prostitution penalty structures is proposed.

Fornication (sexual intercourse by unmarried persons) under § 18.2-344 is repealed by the proposed legislation and a technical amendment to § 15.2-1724 is necessitated by the proposed change. In addition, the reference to unmarried people who live together is removed from the statute defining lewd and lascivious behavior in public places (§ 18.2-345).

The proposed amendments to § 18.2-370.1 (taking indecent liberties with a child by a person in a custodial or supervisory relationship) expands the definition from proposed acts to actual sexual intercourse or carnal knowledge with a child. Currently, an adult in a custodial or supervisory relationship who proposes any of the sexual acts specified in § 18.2-370.1 to a child 15 to 17 years of age is guilty of a Class 6 felony, but if the adult actually performs the sexual acts with the child, he is guilty only of a Class 1 misdemeanor under § 18.2-371 (contributing to the delinquency of a minor);

The Commission provides analyses of the impact on prison and jail bed space and community corrections placement needs in accordance with § 30-19.1:4. Impact analyses do not comment on the merits of the bill under review.

under the proposed language, in these circumstances, the sexual act will be punished the same as the sexual proposal.

Data Analysis:

Based on FY2000 and FY2001 Pre/Post-Sentence Investigation (PSI) data, there were 51 convictions for non-forcible sodomy under the existing § 18.2-361. Data sources are not available to specifically identify if the sodomy occurred in a public place. However, one can surmise that if a victim did not report the sexual contact, then authorities would have had to observe the crime to obtain a conviction. In 11 of these cases, victim information is available from the PSI; some type of injury was also reported that would indicate the actual offense behavior was not consensual and that the conviction may be the result of a plea agreement. This may indicate that the 40 other sodomies occurred in a public place or at least were observed by law enforcement and may have been consensual in nature. Slightly more than 37% of the convictions for non-forcible sodomy resulted in a state-responsible (prison) term, with a median sentence of two years. Additional offenses for non-forcible sodomy may be prosecuted under § 18.2-29 (soliciting a felony), but data sources do not contain that level of detail.

Existing statutes defining indecent liberties with a child cover acts in which a person proposes sexual intercourse, carnal knowledge or any crime against nature. Based on FY2000-FY2001 PSI data, 43% of convictions for taking indecent liberties with a child under 14 years of age result in a state-responsible (prison) sentence. The median sentence is 2 ½ years. If the defendant held a custodial or supervisory role over a child less than 18 years of age, 35% were sentenced to prison (median sentence of 2 years).

Under existing statutes, if the “indecent liberties” involve actual sexual intercourse, sodomy, or penetration with a child under the age of 13, the rape statutes (§§ 18.2-61, 18.2-67.1 & 18.2-67.2) could be used. Convictions for rape or sodomy of a child under age 13 result in a prison sentence in 86-89% of the cases with median sentences of 10 ½ years to 12 years. Aggravated sexual battery of a child under age 13 (§ 18.2-67.3) may apply when the “indecent liberties” advances past a proposal, to touching, but not sexual intercourse or carnal knowledge. A prison sentence is recommended in the majority (74%) of convictions for aggravated sexual battery of a child under age 13; the median sentence for these prison cases is four years.

According to the FY 2000 and FY 2001 Local Inmate Data System (LIDS), which contains information on offenders held pre- or post-trial in jail, there were two convictions for fornication under the existing § 18.2-344. Fornication is punishable by a fine up to a \$250. A conviction for fornication has no impact on state or local prisons or jails.

There were no convictions for the Class 3 misdemeanor of lewd or lascivious behavior (§ 18.2-345), and only one for the subsequent conviction (Class 1 misdemeanor); this conviction resulted in a local-responsible (jail) sentence of 15 days (FY2000-FY2001 LIDS data). Since records indicate only one offender was convicted, it is implied that the section of § 18.2-345 pertaining to unmarried couples was not applicable in this case.

The Commission provides analyses of the impact on prison and jail bed space and community corrections placement needs in accordance with § 30-19.1:4. Impact analyses do not comment on the merits of the bill under review.

Contributing to the delinquency of a minor (§ 18.2-371) by engaging in consensual sexual intercourse is a Class 1 misdemeanor. Data sources do not indicate if convictions were made under this statute for consensual carnal knowledge (i.e., cunnilingus, fellatio, anallingus, anal intercourse or object sexual penetration). Of the 47 convictions included in the LIDS data, all but three convictions resulted in a jail sentence. The average (median) amount served in a local-responsible facility is 1.4 months.

The prostitution statutes (§§ 18.2-346 and 18.2-348) currently define illicit sex by referring to § 18.2-361, the crimes against nature statute. There are 1,013 convictions for prostitution contained in the FY2000 & FY2001 LIDS data; 796 for prostitution, 208 for solicitation and 9 for aiding in prostitution. In most cases, offenders were sentenced to a short period of incarceration in a local-responsible (jail) facility. Please see table below for detailed information.

Several statutes refer to carnal knowledge or sexual battery in correctional facilities, but are focused on assaults by employees. There are no other specific statutes related to carnal knowledge in correctional facilities. Based on PSI data, there were four felony convictions of § 18.2-64.2 (carnal knowledge of an inmate or probationer) and none resulted in a state-responsible (prison) period of incarceration. LIDS data includes six convictions of § 18.2-67.4, sexual battery of an inmate or probationer, and all resulted in a local-responsible average (median) sentence of 4 ½ months.

Background Sentencing Information

| Felony Crime | Number of Cases | % No Incarceration | % Local Responsible | % State Responsible | Median Prison Sentence |
|---|-----------------|--------------------|---------------------|---------------------|------------------------|
| Non-forcible sodomy § 18.2-361 | 51 | 33.3% | 29.4% | 37.3% | 2 years |
| Solicitation to commit a felony § 18.2-29 | 32 | 40.6% | 18.8% | 40.6% | 2 Years |
| Carnal knowledge, victim 13 or 14 years of age § 18.2-63 | 284 | 31.7% | 26.1% | 42.3% | 2 ½ years |
| Aggravated sexual battery, victim under age 13 § 18.2-67.3 | 330 | 13.6% | 12.7% | 73.6% | 4 years |
| Forcible intercourse, victim under age 13 § 18.2-61 | 106 | 10.4% | .9% | 88.7% | 10 ½ years |
| Forcible sodomy, victim under age 13 § 18.2-67.1 | 134 | 14.2% | 0% | 85.8% | 12 years |
| Indecent liberties with child under 14 years of age § 18.2-370 | 156 | 23.1% | 34.0% | 42.9% | 2 ½ years |
| Take indecent liberties with child in custodial relationship § 18.2-370.1 | 116 | 29.3% | 35.3% | 35.3% | 2 years |
| Carnal knowledge of inmate § 18.2-64.2 | 4 | 50% | 50% | 0% | --- |

Data Source: FY2000 and FY2001 Pre/Post-Sentence Investigation (PSI) database

The Commission provides analyses of the impact on prison and jail bed space and community corrections placement needs in accordance with § 30-19.1:4. Impact analyses do not comment on the merits of the bill under review.

| Misdemeanor Crimes | Number of Cases | % No Incarceration | % Local Responsible | % State Responsible | Median Local Responsible Sentence |
|--|-----------------|--------------------|---------------------|---------------------|-----------------------------------|
| Contributing, consensual Intercourse with minors §18.2-371 | 47 | 6.3% | 93.6% | 0% | 1.4 months |
| Fornication § 18.2-344 | 2 | 100% | 0% | 0% | --- |
| Prostitution § 18.2-346 | 796 | 15.3% | 84.7% | 0% | 2 months |
| Soliciting Prostitution § 18.2-346 | 208 | 5.8% | 94.2% | 0% | 3.5 months |
| Aiding Prostitution § 18.2-348 | 9 | 0% | 100% | 0% | .59 months |
| Sexual Battery of Inmate § 18.2-67.4 | 6 | 0% | 100% | 0% | 4.5 months |

Note: Includes only convictions of those held in the local jail pretrial or sentenced to serve time post-trial.
Data Source: FY2001 and FY2002 Local Inmate Data System (LIDS) database

Impact of Proposed Legislation:

The bulk of the proposed legislation amends the *Code of Virginia* when a statute refers specifically to §18.2-361, the crimes against nature statute. The proposed amendments now reference both §18.2-361 and new language that defines the prohibited acts as carnal knowledge. Current statutes already cover the type of behavior defined as carnal knowledge, so no new offense behavior is covered by the proposed amendments and no additional jail or prison beds would be needed.

The proposed statute defining carnal knowledge in a correctional facility prohibits acts that are likely covered by several existing provisions; therefore, no additional behavior is being criminalized. For example, non-forcible sodomy is a Class 6 felony under the existing § 18.2-361. However, given the Lawrence et al. v. Texas decision and the proposed addition of § 18.2-361.1 regarding carnal knowledge in a public place, this aspect of the proposal explicitly criminalizes sex acts between inmates and defines the crime as a Class 1 misdemeanor. Existing provisions prohibit sex acts between correctional employees and inmates or probationers and typically do not result in state-responsible (prison) time. The number of possible convictions for sex acts between inmates based on the proposed addition to the *Code of Virginia* cannot be determined.

The expansion of indecent liberties to include actual sex acts, not just proposed or exposure acts, will increase the penalty for certain acts involving a person in a custodial or supervisory relationship over a child 15 to 17 years of age from a Class 1 misdemeanor to a Class 6 felony. However, the proposal may allow for prosecution of other types of cases under this expanded statute, which carries a lower statutory maximum and historically results in lower prison sentences than other sexual offenses defined in the *Code*. The net effect of this aspect of the proposal cannot be quantified.

The Commission provides analyses of the impact on prison and jail bed space and community corrections placement needs in accordance with § 30-19.1:4. Impact analyses do not comment on the merits of the bill under review.

Fornication, repealed by this proposal, will have no impact on jail or prison beds. Fornication is a Class 4 misdemeanor and carries only a fine. No jail time could be imposed for this offense.

Overall, however, the impact of the proposed legislation on the state-responsible (prison) bed space needs of the Commonwealth cannot be determined.

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.

sex02_0894