



Fiscal Impact Statement for Proposed Legislation

Virginia Criminal Sentencing Commission

House Bill No. 985

(Patron – Gilbert)

LD #: 18104130

Date: 12/28/2017

Topic: Unlawful image of incapacitated adult

Fiscal Impact Summary:

- **State Adult Correctional Facilities:**
\$50,000*
- **Local Adult Correctional Facilities:**
Cannot be determined
- **Adult Community Corrections Programs:**
Cannot be determined

- **Juvenile Direct Care:**
Cannot be determined**
- **Juvenile Detention Facilities:**
Cannot be determined**

**Provided by the Department of Juvenile Justice

* The estimated amount of the necessary appropriation cannot be determined for periods of imprisonment in state adult correctional facilities; therefore, Chapter 836 of the 2017 Acts of Assembly requires the Virginia Criminal Sentencing Commission to assign a minimum fiscal impact of \$50,000.

Summary of Proposed Legislation:

The proposal amends two sections of the *Code of Virginia* relating to the creation of unlawful images. Currently, under § 18.2-386.1, it is a Class 1 misdemeanor for any person to knowingly and intentionally create an image of any nonconsenting person in a state of undress or create an image by placing a lens or device beneath or between a person's legs when the circumstances are such that the person being recorded would have a reasonable expectation of privacy. If the nonconsenting person is under the age of 18, the offense is elevated to a Class 6 felony. A third or subsequent conviction under § 18.2-386.1 within 10 years is also a Class 6 felony. The proposal would expand § 18.2-386.1 to explicitly include images of incapacitated adults and elevate the penalty for unlawful images of incapacitated adults to a Class 6 felony. An incapacitated adult, as defined in § 18.2-369, is "any person 18 years of age or older who is impaired by reason of mental illness, intellectual disability, physical illness or disability, advanced age or other causes to the extent the adult lacks sufficient understanding or capacity to make, communicate or carry out reasonable decisions concerning his well-being."

Under § 18.2-386.2, it is currently a Class 1 misdemeanor for any person, with intent to coerce, harass or intimidate to maliciously disseminate an image of another in a state of undress when the person knows, or has reason to know, that he is not licensed or authorized to disseminate the image. The proposal would increase the penalty to a Class 6 felony if the person depicted in the image is an incapacitated adult.

Analysis:

Existing data do not contain sufficient detail to determine the number of cases that would be affected by the proposed changes. However, affected offenders may be sentenced similarly to those currently convicted of felonies under § 18.2-386.1 and § 18.2-386.2.

Based on Circuit Court Case Management System (CMS) data for fiscal year (FY) 2016 and FY2017, nine offenders were convicted of a felony under § 18.2-386.1 for creating an unlawful image of a person under the age of 18 (as the primary, or most serious, offense). Of these, more than half (55.6%) received a local-responsible (jail) term with a median sentence of six months. Another one-third (33.3%) of these offenders were given a state-responsible (prison) term; the median sentence for those committed to prison was 1.5 years. The remaining 11.1% did not serve an active term of incarceration. No offenders were convicted of a felony for a third or subsequent violation of § 18.2-186.1 during this two-year period.

According to the General District Court Case Management System (CMS) for fiscal year (FY) 2016 and FY2017, 54 offenders were convicted of a Class 1 misdemeanor under § 18.2-386.1 for creating an unlawful image. More than half (57.4%) of these offenders received a local-responsible (jail) term with a median sentence of two months. The remaining 42.6% did not receive an active term of incarceration to serve. During the same two-year period, 53 offenders were convicted of a Class 1 misdemeanor for maliciously disseminating an image of another in violation of § 18.2-386.2. For this offense, 41.5% received a local-responsible (jail) term for which the median sentence was 1.7 months, while 58.5% were not given an active term of incarceration to serve. Data does not distinguish between images of adults and incapacitated adults.

Impact of Proposed Legislation:

State adult correctional facilities. Because it establishes new Class 6 felonies and potentially expands the applicability of an existing felony for third or subsequent offenses, the proposal may increase the state-responsible (prison) bed space needs of the Commonwealth. However, existing data do not provide sufficient detail to estimate the number of new felony convictions that could result from enactment of the proposal. Therefore, the impact on prison bed space needs cannot be determined.

Local adult correctional facilities. Similarly, the proposal may increase the local-responsible (jail) bed space needs, but the magnitude of the impact cannot be determined.

Adult community corrections programs. Because the proposal could result in felony convictions and subsequent supervision requirements for additional offenders, the proposal may increase the need for adult community corrections resources. However, the impact on community corrections programs cannot be calculated.

Virginia's sentencing guidelines. Convictions under § 18.2-386.1 and § 18.2-386.2 are not covered by the sentencing guidelines when these offenses are the primary, or most serious, offense in a case. However, convictions under these statutes could augment the guidelines recommendation if the most serious offense at sentencing is covered by the guidelines. No adjustment to the guidelines would be necessary under the proposal.

Juvenile direct care. According to the Department of Juvenile Justice, the impact of the proposal on direct care (juvenile correctional center or alternative commitment placement) bed space needs cannot be determined.

Juvenile detention facilities. The Department of Juvenile Justice reports that the proposal's impact on the bed space needs of juvenile detention facilities 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; therefore, Chapter 836 of the 2017 Acts of Assembly requires the Virginia Criminal Sentencing Commission to assign a minimum fiscal impact of \$50,000.

Pursuant to § 30-19.1:4, the estimated amount of the necessary appropriation cannot be determined for periods of commitment to the custody of the Department of Juvenile Justice.

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