



Fiscal Impact Statement for Proposed Legislation

Virginia Criminal Sentencing Commission

House Bill No. 623 Amendment in the Nature of a Substitute (Patrons Prior to Substitute – Simon)

LD#: 20108628

Date: 02/20/2020

Topic: References to gender and sexual intercourse in specific statutes

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 854 of the 2019 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 numerous sections of the *Code of Virginia* to modify references to gender and to replace husband/wife, brother/sister, and other relationships by marriage or blood with broader, gender-neutral terms. The proposal repeals statutory prohibitions on same-sex marriages and civil unions or other arrangements between persons of the same sex¹ and modifies laws regarding children born through assisted conception to make them applicable to both opposite-sex and same-sex married couples. The proposal amends other *Code* sections to replace references to adultery and fornication² with the phrase “sexual intercourse.”

The proposal affects five *Code* sections relating to criminal offenses. In § 18.2-49 (abduction), the proposal replaces “female under sixteen years of age” with “child under 16 years of age.” In § 18.2-362 (bigamy), “husband” and “wife” are replaced with “such person’s spouse.” In § 18.2-366 (sexual intercourse by persons forbidden to marry), gender-specific terms are modified to gender-neutral ones. In § 18.2-368 (leaving wife for prostitution), the proposal replaces “wife” with “spouse.” In § 18.2-417 (slander and libel), “female” is replaced with “person.”

¹ These prohibitions are no longer valid following the United States Supreme Court decision in *Obergefell v. Hodges*, 576 U.S. __ (June 26, 2015).

² Defined respectively as a married person having voluntary sexual intercourse with someone who is not their spouse (§ 18.2-365), and an unmarried person having voluntary sexual intercourse with another person (§ 18.2-344).

Penalties for crimes defined in §§ 18.2-49, 18.2-362, 18.2-366, 18.2-368 and 18.2-417 remain unchanged under the proposal. Currently, under § 18.2-49, it is a Class 5 felony to (1) threaten or attempt to abduct any other person with intent to extort money or pecuniary benefit, or (2) assist in the abduction of, or threaten to abduct, any person with the intent to defile, or (3) assist in the abduction of, or threaten to abduct, any female under the age of 16 for the purposes of concubinage or prostitution. Bigamy under § 18.2-362 is punishable as a Class 4 felony. Under § 18.2-366, any person who commits adultery or fornication with any person whom he or she is forbidden by law is guilty of a Class 1 misdemeanor; however, any person who commits certain sexual acts with a specified family member is guilty of a Class 5 felony or, if the family member is 13 to 17 years of age, a Class 3 felony. Under § 18.2-368, it is a Class 4 felony for a person, by force, fraud, intimidation, or threats, to place or leave, or procure another person to place or leave, his wife for the purpose of prostitution or unlawful sexual intercourse. Slander and libel under § 18.2-417 is a Class 3 misdemeanor.

Analysis:

Existing data do not contain sufficient detail to determine the number of cases that would be affected by the proposal. However, affected offenders may be sentenced similarly to those who are currently convicted under existing provisions.

According to fiscal year (FY) 2014 through FY2019 Sentencing Guidelines data, two offenders were convicted under § 18.2-49 for threatening, attempting or assisting an abduction. It was the primary, or most serious, offense in both of the cases. One of these offenders received a 10-month jail sentence, while the other offender did not receive an active term of incarceration to serve after sentencing.

Also, during FY2014-FY2019, 17 offenders were convicted of a felony under § 18.2-362 for marrying when a spouse was still alive (bigamy). It was the primary (most serious) offense in 15 cases. Of these, the majority (66.7%) did not receive an active term of incarceration to serve after sentencing. Another 26.7% received a local-responsible (jail) term for which the median sentence was six months. The remaining offender received a state-responsible (prison) term of 1.5 years.

During the same six-year period, three offenders were convicted under §18.2-368 for placing or leaving one's wife in a bawdy place for the purposes of prostitution or unlawful sexual intercourse. One individual received a one-year prison sentence, while the remaining two offenders did not receive an active term of incarceration to serve after sentencing.

In addition, during FY2014-FY2019, 17 offenders were convicted of a Class 5 felony for adultery or fornication with "his daughter or granddaughter, or with her son or grandson or her father or his mother," a violation of § 18.2-366. It was the most serious offense in ten of the cases. Eight offenders (80%) received a state-responsible (prison) term with a median sentence of 6.5 years. One offender was sentenced to serve five months in jail; the remaining offender did not receive an active term of incarceration to serve after sentencing. Another 31 offenders were convicted of the Class 3 felony under § 18.2-366 for a parent or grandparent committing adultery or fornication with his or her child or grandchild when the child was 13 to 17 years old. This was the most serious offense in 19 cases. In one case, involving an attempt to commit adultery or fornication with a child, the offender was sentenced to serve three months in jail. In the remaining 18 cases, the majority (83.3%) of offenders received a state-responsible (prison) term with a median sentence of 12 years.

According to the General District Court and the Juvenile & Domestic Relations Court Case Management Systems (CMS) for FY2014 through FY2019, 14 offenders were convicted of an unclassified misdemeanor with a six-month maximum sentence under § 20-40. The offense resulted from leaving the Commonwealth to avoid conviction for a prohibited marriage under § 20-38. Two of these individuals received

local-responsible (jail) terms of one and four months, respectively. The remaining offenders (85.7%) did not receive an active term of incarceration to serve after sentencing.

According to Juvenile & Domestic Relations Court and General District Court data for FY2014 through FY2019, nine offenders were convicted of adultery under § 18.2-365. Adultery, a Class 4 misdemeanor, is punishable by a fine of not more than \$250.

Impact of Proposed Legislation:**State adult correctional facilities.**

To the extent the proposal expands the applicability of existing felony provisions to additional persons³, the proposal may increase the state-responsible (prison) bed space needs of the Commonwealth. Existing databases do not provide sufficient detail to estimate the number of new felony convictions that may result from enactment of the proposal. Criminal behavior defined in §§ 18.2-49 and 18.2-366 may currently be addressed by other statutes within the *Code of Virginia* and the net effect of changes to these statutes on felony convictions cannot be determined. For these reasons, the magnitude of the impact on prison bed space needs cannot be quantified.

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 an additional number of offenders, the proposal may increase the need for state community corrections resources. Since the number of cases that may be affected by the proposal cannot be determined, the potential impact on community corrections cannot be quantified.

Virginia's sentencing guidelines. Felony convictions under §§ 18.2-49, 18.2-362, 18.2-366, and 18.2-368 are covered by the sentencing 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 854 of the 2019 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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³ In *Howell v. McAuliffe* (2016), the Supreme Court of Virginia specified that, in the absence of a contrary indication, "the masculine includes the feminine (and vice versa) and the singular includes the plural (and vice versa)." See Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 129 (2012) (App. 250). See also Code § 1-216 ("A word used in the masculine includes the feminine and neuter."); Code § 1-227 ("A word used in the singular includes the plural and a word used in the plural includes the singular.").