

Department of Planning and Budget

2021 Fiscal Impact Statement

1. Bill Number: HB2303

House of Origin ☒ Introduced ☐ Substitute ☐ Engrossed
Second House ☐ In Committee ☐ Substitute ☐ Enrolled

2. Patron: Hudson

3. Committee: Courts of Justice

4. Title: Possession of controlled substances; penalties.

5. Summary: Currently, under § 18.2-250 (Possession of controlled substances unlawful), for any person other than an inmate of a penal institution as defined in § 53.1-1 or in the custody of an employee thereof), possession of a Schedule I or II controlled substance is punishable as a Class 5 felony and possession of a Schedule IV controlled substance is punishable as a Class 2 misdemeanor; possession of a Schedule V controlled substance is punishable as a Class 3 misdemeanor and possession of a Schedule VI controlled substance is punishable as a Class 4 misdemeanor. This bill reduces penalties so that possession of a Schedule I, II, or III controlled substance is punishable as a Class 1 misdemeanor and possession of a Schedule V or VI controlled substance is punishable as a Class 4 misdemeanor. The bill removes references to felony convictions of § 18.2-250 in several sections of the Code of Virginia.

Currently, under § 18.2-257, any person who attempts to commit any offense defined in this article or in the Drug Control Act (§ 54.1-3400 et seq.) that is a felony shall be imprisoned for not less than one nor more than ten years provided, however, that any person convicted of attempting to commit a felony for which a lesser punishment may be imposed may be punished according to such lesser penalty. This bill removes the length of the imposed penalty and provides that such attempt is punishable as a Class 6 felony.

Under current law, a previous conviction for any drug-related criminal offense, or under any statute of the United States or of any state relating to narcotic drugs, marijuana, or stimulant, depressant, or hallucinogenic drugs makes a person ineligible for disposition under § 18.2-251, which allows the court to place the offender on probation. This bill amends this provision, limiting it to a previous conviction for possession of a controlled substance or manufacturing, selling, giving, distributing, or possessing with intent to manufacture, sell, give, or distribute a controlled substance or an imitation controlled substance pursuant to § 18.2-248 or 18.2-250.

The bill removes felony violations of possession of a controlled substance from the definition of a barrier crime related to criminal history checks for eligibility for various types of employment, to volunteer or provide certain services, or to establish or operate certain types of regulated businesses. These amendments affect organizations including children's residential facilities, child placement agencies, adoptive and foster parents, community

service boards, and other organizations that provide care to children, the elderly, or the disabled.

Current law prohibits a prisoner in a state, local, or community correctional facility or in the custody of an employee thereof from procuring, selling, secreting or possessing a controlled substance classified in Schedule III Schedules I through VI of the Drug Control Act (§ 54.1-3400 et seq.) or marijuana. Procuring, selling, secreting, or possessing Schedule III is currently punishable as a Class 5 felony. This bill amends this provision to prohibit prisoners from secreting or possessing a controlled substance in Schedules I through VI and makes punishments the same as those for non-incarcerated people, specifically: secreting or possessing a Schedule I, II, or III controlled substance is punishable as a Class 1 misdemeanor, secreting or possessing a Schedule IV controlled substance is punishable as a Class 2 misdemeanor, and secreting or possessing and Schedule V or VI controlled substance is punishable as a Class 4 misdemeanor.

The bill provides that the definition of "controlled substance" for purposes of the Drug Control Act does not include mere residue of any drug, substance, or immediate precursor in Schedules I through VI that is not a weighable quantity or a countable dosage unit.

6. Budget Amendment Necessary: Indeterminate. See Line 8.

7. Fiscal Impact Estimates: Preliminary. See item 8 below.

8. Fiscal Implications: This bill reduces the penalty charges for possession of Schedule I, II, IV, and V controlled substances, making possession of a Schedule I, II controlled substance punishable as a Class 1 misdemeanor and possession of a Schedule V or VI controlled substance is punishable as a Class 4 misdemeanor. The following historical data relating to drug crimes was provided by the Virginia Criminal Sentencing Commission.

**Sentencing Events involving Felony/Misdemeanor drug offenses
(§§ 18.2-250, 18.2-251, 18.2-477.2, and 53.1-203), FY2019-FY2020**

Offense	Number of Sentencing Events (As primary offense)	Percent Sentenced to Probation	Percent Sentenced to Jail	Median Jail Sentence	Percent Sentenced to Prison	Median Prison Sentence
Possession of controlled substances unlawful (§ 18.2-250)						
Possession of Schedule I or II Drug (Class 5 Felony) (§ 18.2-250(A,a)) ¹	12,581	37.6%	47.3%	3.0 mos.	15.1%	1.6 yrs.
Possession of Schedule IV Drug (Class 2 Misdemeanor) (§ 18.2-250(A,b1))	247	78.1%	21.9%	1.0 mos.	NA	NA
Possession of Schedule V Drug (Class 3 Misdemeanor -Fine only) (§ 18.2-250 (A,b2))	16	NA	NA	NA	NA	NA

First offender misdemeanor violation (§ 18.2-251 – include the cases involving Poss of Sch IV or V drug)	290	87.9%	12.1%	4 days	NA	NA
Felonies by prisoners (§ 53.1-203/18.2-477.2 (juvenile))						
Possess, sell, secrete unlawful chemical compound (Class 6 felony) (§ 53.1-203(5)/18.2-477.2)	90	26.7%	52.2%	4.0 mos.	21.1%	1 yr.
Possess, sell, secrete Schedule III drug or marijuana (Class 5 felony) (§ 53.1-203(6)/18.2-477.2)	148	15.5%	35.8%	7.0 mos.	48.6%	1.3 yrs.

Source: Supreme Court of Virginia's Circuit Court and General District Court Case Management Systems (CMS), as analyzed by the Virginia Criminal Sentencing Commission.

¹ Cases include sentencing events for felony first offender violation cases under § 18.2-251

**Sentencing Events involving
Attempted Felony drug offenses with maximum penalty of 10 years (§ 18.2-257)
FY2015-FY2020**

Offense	Number of Sentencing Events (As primary offense)	Percent Sentenced to Probation	Percent Sentenced to Jail	Median Jail Sentence	Percent Sentenced to Prison	Median Prison Sentence
Attempted felony guidelines offenses (Sell, Distribute, etc. marijuana under § 18.2-248.1 and 18.2-248.01)	27	44.5%	37.0%	1.0 mos.	18.5%	1 yr.
Attempted felony guidelines offenses (Distribution of certain drugs to minors under § 18.2-255)	2	0%	50%	8.0 mos.	50%	2 yrs.
Attempted felony guidelines offenses (Distribute or manufacture Schedule I or II drugs under § 18.2-248)	66	19.7%	28.8%	7.0 mos.	51.5%	2 yrs.
Attempted felony guidelines offenses (Possession of Schedule I or II drugs under § 18.2-250)	52	69.2%	23.1%	3.0 mos.	7.7%	1.6 yrs.
Attempted felony guidelines offenses (Possess, sell, secrete Schedule III drug or marijuana under § 53.1-203(6))	16	6.3%	25.0%	8.0 mos.	68.8%	1.5 yrs.

Source: Virginia Criminal Sentencing Commission's Sentencing Guidelines (SG) database (Fiscal Year (FY) 2015 through FY2020).

Note: All offenses sentenced in the same court by the same judge at the same time are included in one sentencing event. Circuit Court CMS data do not include cases from Fairfax or Alexandria as clerks in those jurisdictions do not participate in the statewide Case Management System. Conviction data are based on the offense at conviction and exclude subsequent probation violations or other violations stemming from that offense.

By reducing a Class 5 felony penalty to a Class 1 misdemeanor, the proposed legislation is expected to reduce the number of offenders who would be sentenced to terms in state prisons. Under the proposals in this bill, offenders sentenced to active terms of incarceration would serve the sentence in local jails. Anyone convicted of a Class 1 misdemeanor is subject to a sentence of up to 12 months in jail and a fine of not more than \$2,500, either or both.

The potential savings associated with this bill depends on how many offenders would have been sentenced to a state-responsible term and where those offenders would ultimately serve their sentences. The cost of a bed in a DOC facility (prison) in FY2020 was \$38,688 as calculated by the Department of Planning and Budget. The Commonwealth pays localities \$12.00 a day for any state-responsible prisoner held in a local jail. Potential savings would be offset by the costs incurred to house misdemeanants in jails. The Commonwealth currently pays the localities \$4.00 a day for each misdemeanant or otherwise local-responsible prisoner held in a jail. It also funds a large portion of the jails' operating costs, e.g. correctional officers. The state's share of these costs varies from locality to locality. However, according to the Compensation Board's most recent Jail Cost Report (November 2020), the estimated total state support for local jails averaged \$34.59 per inmate, per day in FY 2019.

This bill would also affect the amount of fines collected for drug-related offenses. A Class 3 misdemeanor is punishable by a fine of up to \$500 and a Class 4 misdemeanor is punishable by a fine of up to \$250. All revenue collected from such fines is deposited into the Literary Fund. However, it is not possible to estimate either the number of convictions that may result or the amount of each fine that may be assessed under this legislation.

The impact on the Commonwealth's Attorneys and the Indigent Defense Commission cannot be determined at this time. This bill is not expected to have a fiscal impact on the Department of Health, the Department of State Police, the Department of Social Services, or the Department of Forensic Science. The impact this bill may have on the Department of Behavioral Health and Developmental Services and the Department of Juvenile Justice is not known at this time.

- 9. Specific Agency or Political Subdivisions Affected:** Department of Corrections, Department of Juvenile Justice, law enforcement agencies, local and regional jails, Department of Social Services, Department of Behavioral Health and Developmental Services, Courts, Clerks of Court, Commonwealth's Attorneys, Public Defenders Office

10. Technical Amendment Necessary: No

11. Other Comments: None