



Fiscal Impact Statement for Proposed Legislation

Virginia Criminal Sentencing Commission

House Bill No. 2312 (Patron – Herring)

LD#: 21101659 / 1661

Date: 1/19/2021

Topic: Marijuana legalization

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 1289 of the Acts of Assembly of 2020 requires the Virginia Criminal Sentencing Commission to assign a minimum fiscal impact of \$50,000.

Pursuant to § 30-19.1:4, fiscal impact statements prepared by the Virginia Criminal Sentencing Commission only address the estimated increase in operating costs associated with additional state-responsible prison beds and do not reflect any other costs or savings that may be associated with, or any revenue that may be generated by, the proposed legislation.

Summary of Proposed Legislation:

The proposal would establish a licensing and regulation system for marijuana cultivation facilities, marijuana manufacturing facilities, marijuana testing facilities, and retail marijuana stores that would be overseen by the Virginia Alcoholic Beverage Control Authority (renamed the Virginia Alcoholic Beverage and Cannabis Control Authority in the proposal). The proposal repeals § 18.2-248.1, § 18.2-250.1 and other sections and, under the system created by the proposal, there would be no criminal or civil penalties for possession of up to one ounce of retail marijuana by persons who are 21 years of age or older. Possession of more than one ounce of retail marijuana by a person 21 or older would be subject to a civil penalty of no more than \$25; however, possession of marijuana by a person under 21 would be a Class 1 misdemeanor.

While the proposal repeals § 18.2-248.1, related to the manufacture and distribution of marijuana, the proposal establishes a number of new misdemeanor and felony offenses for engaging in these activities without the required license or otherwise engaging in prohibited practices related to the production, sale, etc., of marijuana. For example, cultivation or manufacture of marijuana without a license would be a Class 6 felony. Violation of home cultivation laws, which would allow individuals to grow two mature and two immature plants at any one time, would be a Class 6 felony if the individual were cultivating 50

to 100 plants or, if the individual were cultivating more than 100 plants, a felony punishable by imprisonment of 1 to 10 years. Possession of more than five pounds of marijuana on one's person or in a public place would also be a felony punishable by 1 to 10 years. The distribution or sale of marijuana without a license would be a Class 2 misdemeanor for the first offense and a Class 1 misdemeanor for a second or subsequent offense; however, sale of marijuana to a person who is under the age of 21 or intoxicated would be a Class 1 misdemeanor. In addition, the proposal expands § 5.1-13 to make it a Class 6 felony to operate an aircraft while under the influence of marijuana and amends § 18.2-308.012 to make it a Class 1 misdemeanor to carry a concealed handgun while under the influence of marijuana.

Violations of specified licensing requirements on the part of licensees, including failure to pay taxes and keep certain records, would be Class 1 misdemeanors; however, the proposal specifies that tax returns filed monthly by licensees must be made under oath (see proposed § 4.1-639). Under § 18.2-434, a person to whom an oath is lawfully administered who willfully and falsely swears to any material matter may be prosecuted for perjury, a Class 5 felony. If a material false statement on such a tax return could be prosecuted in the same manner as perjury and other false swearings, licensees may be subject to a felony perjury charge.

At the same time, the proposal reduces a number of existing crimes from felonies to misdemeanors. These include: distribution of marijuana to a minor (§ 18.2-255), delivery of marijuana to prisoners (§ 18.2-474.1), unlawfully transporting five pounds or more of marijuana into the Commonwealth (§ 18.2-248.01), and obstruction of justice by force or threat by a person charged with marijuana distribution (§ 18.2-460(C)). The proposal eliminates the felony for possessing a firearm while unlawfully distributing more than one pound of marijuana (§ 18.2-308.4), thereby removing the existing five-year mandatory minimum penalty for the offense. The proposal also removes marijuana from several existing provisions including: drug kingpin laws (§ 18.2-248), prohibitions on the sale of certain drugs near schools (§ 18.2-255.2), and prescription fraud (§ 18.2-258.1).

Finally, the proposal would establish a mechanism for incarcerated persons serving time for marijuana offenses to petition the court for a reduction in sentence. The proposal also would provide for the expungement of prior marijuana arrest, charge, conviction, adjudication and civil offense records under certain circumstances.

The 2020 General Assembly enacted legislation that: 1) decriminalized simple possession of marijuana and provided a civil penalty of no more than \$25, 2) increased the quantity threshold at which the distribution, etc., of marijuana becomes a felony (from more than ½ ounce to more than 1 ounce), and 3) established a rebuttable presumption that a person who possesses up to one ounce of marijuana possesses it for personal use only. This legislation became effective on July 1, 2020.

Currently, distribution of one ounce or less of marijuana is a Class 1 misdemeanor. Distribution of more than one ounce up to five pounds of marijuana is a Class 5 felony, while distribution of more than five pounds and manufacture of marijuana are both felonies punishable by up to 30 years in prison. A third or subsequent conviction for distribution of marijuana is punishable by up to life in prison and requires a five-year mandatory minimum prison sentence. The *Code* includes additional felonies for transporting certain amounts of marijuana into the Commonwealth, distributing marijuana to a minor, involving a minor in the distribution of marijuana, and distributing near schools or other specified properties.

Analysis:

While the number of offenders convicted under marijuana provisions prior to July 1, 2020, can be identified (see table below), the number of individuals who may be convicted of the new misdemeanors and felonies defined in the proposal, and the sentences these individuals may receive, is not known.

Offenders Convicted of Select Marijuana Offenses (as the Most Serious Offense), FY2019-FY2020

Primary Offense	Total Number of Cases	Percent Sentenced to Probation	Percent Sentenced to Jail	Median Jail Sentence	Percent Sentenced to Prison	Median Prison Sentence
Distribution of marijuana as accommodation (§ 18.2- 248.1(a,3)) ¹	18	50.0%	50.0%	1.0 mo.	N/A	N/A
Distribution, etc., ½ oz. or less marijuana (§ 18.2-248.1(a,1)) ¹	1,163	50.5%	49.5%	1.0 mo.	N/A	N/A
Distribution, etc., > ½ oz. to 5 lbs. marijuana (§ 18.2-248.1(a,2)) ²	1,015	32.4%	50.0%	3.0 mos.	17.5%	1.7 yrs.
Distribution, etc., more than 5 lbs. marijuana (§ 18.2- 248.1(a,3)) ²	72	11.1%	25.0%	8.5 mos.	63.9%	2.0 yrs.
Manufacture marijuana – not for personal use (§ 18.2-248.1(c)) ²	40	42.5%	50.0%	6.0 mos.	7.5%	10.0 yrs.
Distribute marijuana – 3 rd or subseq. conviction (§ 18.2-248.1(d)) ²	11	9.1%	0.0%	N/A	90.9%	5.4 yrs.
Sell less than 1 oz. marijuana to minor (§ 18.2-255(A,i)) ²	6	0.0%	0.0%	N/A	100.0%	2.6 yrs.
Sell 1 oz. or more marijuana to minor (§ 18.2-255(A,i)) ²	0	N/A	N/A	N/A	N/A	N/A
Transport 5 lbs.+ marijuana into Commonwealth (§18.2-248.01) ²	19	5.3%	0.0%	N/A	94.7%	3.5 yrs.
Own or maintain common nuisance, 2 nd or subseq. (§ 18.2-258) ³	0	N/A	N/A	N/A	N/A	N/A
Delivery of narcotics/marijuana to inmate (§ 18.2-474.1) ³	133	23.3%	50.4%	6.0 mos.	26.3%	1.0 yrs.
Sell more than 1 lb. of marijuana while possessing firearm (§18.2-308.4) ³	0	N/A	N/A	N/A	N/A	N/A
Operate aircraft under influence (§ 5.1-13) ³	0	N/A	N/A	N/A	N/A	N/A

Notes: The analysis is based on cases in which the specified offense was the primary, or most serious, offense in the sentencing event.

¹ Source: Supreme Court of Virginia's General District Court Case Management System, as analyzed by the Sentencing Commission

² Source: Virginia Criminal Sentencing Commission's Sentencing Guidelines Data System

³ Source: Supreme Court of Virginia's Circuit Court Case Management System, as analyzed by the Sentencing Commission

Impact of Proposed Legislation:

State adult correctional facilities. While the proposal would eliminate certain criminal penalties related to marijuana from the *Code* and reduce penalties for other offenses, it would establish a number of new misdemeanors and felonies for engaging in activities related to the cultivation, manufacture, testing and sale of marijuana without the required license or otherwise engaging in prohibited practices related to the production, sale, etc., of marijuana. If enacted, the proposal also specifies that monthly tax returns filed by licensees must be made under oath, which may have felony implications for making a material false statement on the return. The net effect on the number of convicted individuals and the impact on judicial sentencing patterns cannot be estimated. Therefore, the net impact on the future state-responsible (prison) bed space needs of the Commonwealth cannot be determined.¹

¹ Pursuant to § 30-19.1:4, fiscal impact statements prepared by the Virginia Criminal Sentencing Commission only address the estimated increase in operating costs associated with additional state-responsible prison beds and do not reflect any other costs or savings that may be associated with, or any revenue that may be generated by, the proposed legislation.

Local adult correctional facilities. Similarly, the net impact on local-responsible (jail) bed space needs cannot be estimated.

Adult community corrections programs. The net effect of the proposal on adult community corrections resources cannot be determined.

Virginia's sentencing guidelines. Felony violations under § 18.2-248.1 related to the manufacture or distribution of marijuana are covered by the sentencing guidelines. As new felony offenses, convictions under the proposed *Code* sections would not be covered by the guidelines as the primary, or most serious, offense. Such convictions, however, could augment the guidelines recommendation if the most serious offense at sentencing is covered by the guidelines. If the proposal were enacted, the Sentencing Commission in the future would conduct detailed analyses of sentencing patterns under the new provisions to determine the feasibility of adding the new felonies to the guidelines system.

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 1289 of the Acts of Assembly of 2020 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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