



Fiscal Impact Statement for Proposed Legislation

Virginia Criminal Sentencing Commission

Senate Bill No. 1204 (Patron – Reeves)

LD#: 23102944

Date: 01/03/2023

Topic: Definition of obscene, etc.

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 2 of the Acts of Assembly of 2022, Special Session I, 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 include 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 the proposed legislation.

Summary of Proposed Legislation:

The proposal expands the definition of obscene for the purposes of Article 5 of Chapter 8 (obscenity and related offenses) of Title 18.2 and defines the terms material, patently offensive, performance and sexual conduct. Under the proposal, § 18.2-372 defines obscene related to materials or performances as (i) the average person applying contemporary community standards relating to the depiction or description of sexual matters would find that the material or performance taken as a whole appeals to the prurient interest in sex; (ii) the material or performance lacks serious literary, artistic, political, or scientific value; (iii) the material or performance as used is not protected or privileged under the United States Constitution or the Constitution of Virginia; and (iv) such material or performance depicts or describes (a) patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated, including sexual intercourse, sodomy, and sexual bestiality, or (b) patently offensive representations or descriptions of masturbation, excretory functions, sadism, masochism, lewd exhibition of the genitals, the male or female genitals in a state of sexual stimulation or arousal, covered male genitals in a discernibly turgid state or a device designed and marketed as useful primarily for stimulation of the human genital organs.

Currently under § 18.2-372, obscene is defined for the purposes of obscenity law as that which, “considered as a whole, has as its dominant theme or purpose an appeal to the prurient interest in sex, that is, a shameful or morbid interest in nudity, sexual conduct, sexual excitement, excretory functions or products thereof or sadomasochistic abuse, and which goes substantially beyond customary limits of candor in description or representation of such matters and which, taken as a whole, does not have serious literary, artistic, political or scientific value.”

Article 5 of Chapter 8 of Title 18.2 has a number of statutes that specifically cite the word “obscene” when defining offenses or refer to other sections that cite “obscene”. These are:

- § 18.2-374 – Production, publication, sale, possession, etc., of obscene material;
- § 18.2-375 – Obscene exhibitions and performances;
- § 18.2-376 – Advertisement of obscene items, exhibitions, etc.;
- § 18.2-376.1 – Using a computer in connect with violation of §§ 18.2-374, 18.2-375 or 18.2-376;
- § 18.2-377 – Posting of obscene placards, posters, etc.;
- § 18.2-378 – Coercing acceptance of obscene articles or publications;
- § 18.2-379 – Permitting minors in obscene performances;
- § 18.2-382 – Taking obscene pictures or filming obscene acts;
- § 18.2-387 – Indecent exposure; and
- § 18.2-387.1 - Obscene sexual display.

Violations of §§ 18.2-374, 18.2-375, 18.2-376, 18.2-376.1, 18.2-377, 18.2-378 and 18.2-379 are punishable as Class 1 misdemeanors for the first offense and Class 6 felonies for any second or subsequent offense. Violations of § 18.2-387 are Class 1 misdemeanors; however, under § 18.2-67.5:1, when a person is convicted of misdemeanor indecent exposure or other specified misdemeanor sex offense and the court finds that the person has previously been convicted of two or more of such offenses during a 10-year period (each such offense occurring on a different date), he is guilty of a Class 6 felony. Finally, violations of 18.2-387.1 are Class 1 misdemeanors, while violations of § 18.2-382 are Class 3 misdemeanors.

Analysis:

The proposal potentially expands the applicability of a number of offenses defined in current *Code*. Existing data sources do not contain sufficient detail to estimate the number of additional convictions that may result from enactment of the proposal. However, new individuals convicted of offenses defined in the affected statutes may be sentenced similarly to individuals sentenced under existing provisions.

According to the Circuit Court Case Management System (CMS) data for fiscal year (FY) 2017 through FY2022, four offenders were convicted of a felony for a second or subsequent offense under §§ 18.2-374, 18.2-375, 18.2-376, 18.2-376.1, 18.2-377, 18.2-378 or 18.2-379. Two of the four offenders received state-responsible (prison) terms of 1.2 years and 3.5 years, respectively. One offender was given a local-responsible (jail) term of six months. The remaining offender did not receive an active term of incarceration to serve after sentencing.

Based on General District Court CMS data for the same six-year period, 19 offenders were convicted of Class 1 misdemeanors under §§ 18.2-374, 18.2-375, 18.2-376, 18.2-376.1, 18.2-377, 18.2-378 or 18.2-379. For the 15.8% (three offenders) who received a local-responsible (jail) term, the median sentence was 20 days. In addition, 1,591 individuals were convicted of Class 1 misdemeanors under § 18.2-387 for indecent exposure or § 18.2-387.1 for obscene sexual display. Nearly two-thirds (60.2%) of these offenders were given a jail term and the median sentence in such cases was 2.0 months.

According to Circuit Court CMS data for the same six-year period, 69 defendants were convicted of a Class 6 felony for a third or subsequent specified misdemeanor sex offense, such as indecent exposure (§ 18.2-67.5:1). This was the primary (most serious) offense for 64 of the defendants. Of these defendants, 46.9% received a state-responsible (prison) term for which the median sentence was 2.0 years. Another 45.3% received a local-responsible (jail) term with a median sentence of 6.0 months. The remaining defendants did not receive an active term of incarceration to serve after sentencing.

Impact of Proposed Legislation:

State adult correctional facilities. Because the revised definition potentially expands the applicability of several felony offenses for which imprisonment is authorized, the proposal may increase the future state-responsible (prison) bed space needs of the Commonwealth. Existing databases do not provide sufficient detail to estimate the number of new felony convictions likely to result from enactment of the proposal; therefore, the magnitude of the impact on prison bed space needs cannot be quantified.

Local adult correctional facilities. Similarly, by expanding the applicability of felony and misdemeanor offenses, the proposal may increase local-responsible (jail) bed space needs; however, the magnitude of the impact cannot be determined.

Adult community corrections resources. Because the proposal could result in convictions and subsequent supervision requirements for an additional number of offenders, the proposal may increase the need for adult community corrections resources. Since the number of cases affected cannot be determined, the potential impact on community corrections cannot be quantified.

Virginia's Sentencing Guidelines. The Sentencing Guidelines do not cover the felony offenses defined in §§ 18.2-374, 18.2-375, 18.2-376, 18.2-376.1, 18.2-377, 18.2-378 or 18.2-379 when such a felony is the primary (or most serious) offense. Furthermore, the Guidelines do not apply if the most serious offense at sentencing is a misdemeanor. However, such convictions may augment the Guidelines recommendation (as additional offenses) 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 2 of the Acts of Assembly of 2022, Special Session I, 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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