



Fiscal Impact Statement for Proposed Legislation

Virginia Criminal Sentencing Commission

House Bill No. 698

Amendment in the Nature of a Substitute

Proposed by the Senate Committee on Finance and Appropriations

(Patron Prior to Substitute – Krizek)

LD#: 24108432

Date: 02/28/2024

Topic: Licensing and retail system for cannabis; cannabis control

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 1 of the Acts of Assembly of 2023, 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 creates a regulatory and licensing structure for the cultivation, manufacture, testing and retail sale of marijuana and marijuana products to be administered by the Virginia Cannabis Control Authority. The Cannabis Control Authority may begin accepting license applications on or after September 1, 2024. Any applicant issued a license by the Authority may operate in accordance with the provisions of this act prior to May 1, 2025; however, prior to May 1, 2025, no licensee may engage in the retail sale of retail marijuana, retail marijuana products, immature marijuana plants, or marijuana seeds.

This proposal also increases amount of marijuana (or equivalent marijuana product) that may be legally possessed by person 21 or older from 1.0 ounces to 2.5 ounces (§ 4.1-1100).

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 activities without the required license or otherwise engaging in prohibited practices related to the production, sale, etc., of marijuana. For example, cultivation, processing, or manufacture of marijuana without the proper license would be a Class 6 felony.¹ 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, any sale of marijuana to a person who is under the age of 21 or intoxicated would be a Class 1 misdemeanor (proposed §§ 4.1-1103 and 4.1-1104). In addition, the proposal expands § 5.1-13 to make it

¹ Under current law, the proposed felony is eligible for the enhanced sentence credits specified in § 53.1-202.3. Individuals convicted of this offense will serve a minimum of 67% of the sentence ordered by the court.

a Class 6 felony to operate an aircraft while under the influence of marijuana² 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 would be Class 1 misdemeanors; however, the proposal specifies that tax returns filed monthly by licensees must be made under oath (see proposed § 4.1-1004). Also, the Cannabis Control Authority can require persons to give testimony or to answer interrogatories under oath (see proposed § 4.1-1007). 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.³ If a materially false statement on the required tax return or false statements to the Authority while under oath could be prosecuted in the same manner as perjury and other false swearings, licensees and other individuals may be subject to felony perjury charges.

At the same time, by removing marijuana from certain sections and adding new provision, 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).

Legislation adopted by the 2021 General Assembly (Special Session I) legalized possession of up to 1.0 ounce of marijuana by persons who are 21 years of age or older and permitted persons 21 years of age or older to cultivate up to four marijuana plants for personal use, effective July 1, 2021. Possession of more than one ounce of marijuana by a person 21 or older is subject to a civil penalty of up to \$25. Possession of four ounces or more but not more than one pound of marijuana is a Class 3 misdemeanor or, for a second or subsequent offense, a Class 2 misdemeanor. Possession of more than one pound of marijuana on one's person or in a public place is a felony punishable by 1 to 10 years. Violation of the home cultivation law is a Class 6 felony if the individual is cultivating 50 to 100 plants or, if the individual is cultivating more than 100 plants, a felony punishable by imprisonment of 1 to 10 years.

Currently, under § 18.2-248.1, 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 proposal repeals § 18.2-248.1.

Analysis:

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. By creating a regulatory and licensing structure, the proposal may possibly result in fewer convictions under existing provisions related to the unlawful distribution of marijuana. Whether or not, or the extent to which, this will occur is not known. Sentencing outcomes for offenders convicted under existing marijuana and perjury laws are shown in the table below.

² The felony offense defined in § 5.1-13 is eligible for the enhanced sentence credits specified in § 53.1-202.3. Individuals convicted of this offense serve a minimum of 67% of the sentence ordered by the court.

³ Perjury under § 18.2-434 is eligible for the enhanced sentence credits specified in § 53.1-202.3. Individuals convicted of this offense serve a minimum of 67% of the sentence ordered by the court.

Offenders Convicted of Select Offenses (as the Most Serious Offense), FY2022-FY2023

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)) ^a	9	66.7%	33.3%	2.0 mos.	N/A	N/A
Distribution, etc., ≤1 oz. marijuana – misd. (§ 18.2-248.1(a,1)) ^a	257	67.3%	32.7%	1.0 mo.	N/A	N/A
Distribution, etc., > 1 oz. to 5 lbs. marijuana - felony (§ 18.2-248.1(a,2)) ^b	296	40.9%	35.1%	3.0 mos.	24.0%	2.0 yrs.
Distribution, etc., > 5 lbs. marijuana – felony (§ 18.2- 248.1(a,3)) ^b	79	32.9%	25.3%	6.0 mos.	41.8%	1.8 yrs.
Manufacture marijuana, not for personal use – felony (§ 18.2-248.1(c)) ^b	11	72.7%	18.2%	6.5 mos.	9.1%	5.0 yrs.
Distribute marijuana, 3 rd or subseq. conviction – felony (§ 18.2-248.1(d)) ^b	1	0.0%	0.0%	N/A	100.0%	5.0 yrs.
Sell less than 1 oz. marijuana to minor – felony (§ 18.2-255(A,i)) ^b	2	50.0%	0.0%	N/A	50.0%	2.0 yrs.
Sell 1 oz. or more marijuana to minor – felony (§ 18.2-255(A,i)) ^b	0	N/A	N/A	N/A	N/A	N/A
Transport 5 lbs.+ marijuana into state – felony (§18.2-248.01) ^b	3	0.0%	33.3%	2.0	66.7%	3.3 yrs.
Perjury -felony (§ 18.2-434) ^b	145	43.4%	46.2%	4.0 mos.	10.3%	1.5 yrs.

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

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

^bSource: Virginia Criminal Sentencing Commission's Sentencing Guidelines Data System

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. The proposal also specifies that monthly tax returns filed by licensees must be made under oath, which may have felony implications for making a materially false statement on the return. Furthermore, the proposal expands the felony for operating an aircraft while under the influence to include the influence of marijuana. The net effect on the number of convicted individuals and the impact on sentencing patterns cannot be estimated; therefore, the net impact on the future state-responsible (prison) bed space needs of the Commonwealth cannot be quantified.

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 of § 18.2-248.1 related to the manufacture or distribution of marijuana and § 18.2-434 related to perjury are currently covered by 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 (as additional offenses) if the most serious offense at sentencing is covered

by the Guidelines. The proposed felonies would not be defined as violent under § 17.1-805(C) for Guidelines purposes. No immediate adjustment to the Guidelines would be necessary under the proposal. If the proposal were enacted, the Sentencing Commission in the future would conduct detailed analyses of sentencing patterns under these 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 1 of the Acts of Assembly of 2023, 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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