



Fiscal Impact Statement for Proposed Legislation

Virginia Criminal Sentencing Commission

House Bill No. 2749

(Patron – Hurt)

LD#: 07-5732105

Date: 1/16/2007

Topic: Sex offender registration requirements and child pornography

Fiscal Impact Summary:

- **State Adult Correctional Facilities:**
At least \$1,322,375 by FY2013 (51 beds)
- **Local Adult Correctional Facilities:**
-15,304 (-1 bed)
- **Adult Community Corrections Programs:**
None (\$0)

- **Juvenile Correctional Centers:**
None (\$0)
- **Juvenile Detention Facilities:**
None (\$0)

Summary of Proposed Legislation:

The proposal amends several statutes to increase penalties and add mandatory minimums for certain offenses related to child pornography and internet solicitation and to expand the requirements for offenders who must register or re-register with the Sex Offender and Crimes against Minors Registry (SOR). The proposed changes involving criminal penalties are summarized in the table below.

Offense(s)	Victim's Age	Current Penalty	Proposed Penalty
Accosting or enticing a minor to be the subject of child pornography – § 18.2-374.1(B1) Producing or attempting to produce child pornography – § 18.2-374.1(B2) Participating in the filming or production of child pornography - § 18.2-374.1 (B3)	Less than 15 years old	Class 5 felony (1 to 10 years)	<u>1st conviction and offender is less than 5 years older than victim:</u> Imprisonment 5 to 30 years (no mandatory minimum) <u>1st conviction and offender is at least 5 years older than victim:</u> Mandatory minimum term of 15 years up to 30 years <u>2nd conviction and offender is at least 5 years older than victim:</u> Mandatory minimum term of 25 years up to 40 years
	15 to 17 years old	Class 5 felony (1 to 10 years)	<u>1st conviction and offender is less than 5 years older than victim:</u> Imprisonment 1 year up to 20 years (no mandatory minimum) <u>1st conviction and offender is at least 5 years older than victim:</u> Mandatory minimum term of 5 years up to 30 years <u>2nd conviction and offender is at least 5 years older than victim:</u> Mandatory minimum term of 15 years up to 30 years

Offense(s)	Victim's Age	Current Penalty	Proposed Penalty
Financing or attempting to finance child pornography – (Proposal moves from § 18.2-374.1C to § 18.2-374.1B4)	Less than 15 years old	Class 4 felony (2 to 10 years)	<u>1st conviction and offender is less than 5 years older than victim:</u> Imprisonment 5 to 30 years (no mandatory minimum) <u>1st conviction and offender is at least 5 years older than victim:</u> Mandatory minimum term of 15 years up to 30 years <u>2nd conviction and offender is at least 5 years older than victim:</u> Mandatory minimum term of 25 years up to 40 years
	15 to 17 years old	Class 4 felony (2 to 10 years)	<u>1st conviction and offender is less than 5 years older than victim:</u> Imprisonment 1 year up to 20 years (no mandatory minimum) <u>1st conviction and offender is at least 5 years older than victim:</u> Mandatory minimum term of 5 years up to 30 years <u>2nd conviction and offender is at least 5 years older than victim:</u> Mandatory minimum term of 15 years up to 30 years
Selling, giving, distributing, transmitting, etc., child pornography (Proposal moves from § 18.2-374.1B4 to § 18.2-374.1:1B)	Less than 18 years old	Class 5 felony (1 to 10 years)	<u>1st conviction:</u> Imprisonment 5 years to 20 years (no mandatory minimum) <u>2nd conviction:</u> Mandatory minimum term of 5 years up to 20 years
Use of a communication system to solicit minors with the intent to take indecent liberties with a child (Proposed § 18.2-374.3C)	Less than 15 years old	Class 5 felony (1 to 10 years)	<u>1st conviction and offender is less than 5 years older than victim:</u> Class 5 felony (1 to 10 years) (no mandatory minimum) <u>1st conviction and offender is at least 5 years older than victim:</u> Mandatory minimum term of 5 years up to 30 years <u>2nd conviction and offender is at least 5 years older than victim:</u> Mandatory minimum term of 15 years up to 40 years
Use of a communication system to solicit minors with the intent to take indecent liberties (Proposed § 18.2-374.3D)	15 to 17 years old	Class 5 felony (1 to 10 years)	<u>1st conviction and offender is at least 5 years older than victim:</u> Class 5 felony (1 to 10 years) (no mandatory minimum) <u>2nd conviction and offender is at least 5 years older than victim:</u> Mandatory minimum term of 1 years up to 20 years <u>Note:</u> There are no proposed penalties if the offender is less than 5 years older than the victim.
Use of a communication system to solicit minors for any activity in violation of §§ 18.2-355, 18.2-361, 18.2-374.1 or 18.2-374.1:1 (proposed § 18.2-374.3E)	Less than 18 years old	Class 5 felony (1 to 10 years)	<u>1st conviction:</u> Imprisonment 5 to 30 years (no mandatory minimum) <u>2nd conviction:</u> Mandatory minimum term of 5 years up to 30 years

The proposal moves the offense defined in § 18.2-374.1:2 (operating an Internet website to facilitate the payment for access to child pornography) to § 18.2-374.1:1C, but does not change the penalty for this offense. The proposal also clarifies the definition of “sexually explicit visual material” by specifically including material stored in a computer’s temporary Internet cache or other temporary memory.

The proposal amends §§ 9.1-903, 9.1-904 and 9.1-912 to expand the requirements for offenders who must register or re-register with the Sex Offender and Crimes against Minors Registry (SOR). Under the proposal, an offender would have to report, in addition to other information already required, any e-mail address, instant messaging, chat or other Internet communication name the offender uses or intends to use. The proposal also provides for the exchange of certain information between Virginia State Police and various Internet services to assist in determining if and when a SOR registrant may have failed to provide required information. Several other amendments are technical in nature.

The 2006 General Assembly revised the penalties for failing to register or re-register as required. For offenders who have not been convicted of a sexually violent offense or murder as defined in § 9.1-902, failure to fully comply with registration requirements is a Class 1 misdemeanor for the first offense and a Class 6 felony for any subsequent violation. Penalties are higher for offenders who have been convicted of a sexually violent offense or murder. For these offenders, failing to register or re-register in the prescribed manner is a Class 6 felony for the first offense and a Class 5 felony for a subsequent violation.

Prior to July 1, 2006, failing to register as required was a Class 1 misdemeanor or, in cases involving sexually violent offenders, a Class 6 felony. There were no penalty enhancements for subsequent violations.

Analysis:

In 2006, the Virginia Criminal Sentencing Commission conducted a special study of offenses involving child pornography and online/electronic solicitation of minors.

According to the Commission’s data, from July 2002 through April 2006, there were 47 cases in which conviction for a crime associated with the production of child pornography (§ 18.2-374.1) was the primary (or most serious) offense in the case. Just over half (55%) of these offenders were sentenced to a state-responsible (prison) term of one year or more; for the prison cases, the median sentence was 3½ years. Approximately one in four offenders (26%) were given a local-responsible (jail) term. The remaining offenders (19%) were given probation without an active term of incarceration. The data include two offenders with a prior record that would make them eligible for the penalty enhancements prescribed in the proposal. In cases in which both the offender’s and the victim’s ages were known, every offender was more than five years older than the victim. None of the offenders were sentenced to the maximum term available under current law.

According to the same data, there were a total of 67 cases in which conviction for a crime defined in § 18.2-374.3 was the primary (or most serious) offense in the case. Of the total, 38 offenders were convicted of a Class 5 felony for using a communication system to solicit minors for prostitution, sodomy or pornography. In these cases, 39% of offenders were sentenced to a state-responsible (prison) term of one year or more; the median sentence for prison cases was two years. More than one in three offenders (37%) were given a local-responsible (jail) term. The remaining offenders (24%) were given probation without an active term of incarceration. The data include one offender with a prior record that would make him eligible for the penalty enhancements prescribed in the proposal. None of the offenders were sentenced to the maximum term available under current law.

The other 29 offenders convicted under § 18.2-374.3 were sentenced for a Class 6 felony for using a communication system to promote or procure the use of minors in obscene material or for any activity

in violation of § 18.2-370 (indecent liberties). For this crime, 31% of offenders received a prison term with a median prison sentence of 1.7 years. Nearly one in four offenders (24%) were order to serve a jail term. Almost half of offenders convicted of this crime (45%) were given probation without an active term of incarceration. None of the offenders were sentenced to the maximum term available under current law.

Impact of Proposed Legislation:

State adult correctional facilities. Increasing the statutory penalty ranges and adding mandatory minimums penalties for most of the offenses defined in §§ 18.2-374.1 and 18.2-374.3 as proposed will increase the future state-responsible (prison) bed space needs of the Commonwealth. The impact on state-responsible (prison) beds is estimated to be at least 51 beds by FY2013. Pursuant to § 30-19.1:4, the estimated amount of the necessary appropriation is at least \$1,322,375.

Estimated Six-Year Impact in State-Responsible (Prison) Beds

FY08	FY09	FY10	FY11	FY12	FY13
3	11	21	31	43	51

The estimated impact is regarded as a minimum estimate. Changes to Sex Offender Registry requirements could result in more Registry violations and additional felony convictions; however, the impact of this portion of the proposal cannot be determined. Moreover, additional resources have been dedicated in recent years to the apprehension of offenders who solicit minors over the internet. It is expected that, in the future, additional offenders will be convicted of these crimes and have the requisite prior convictions that will qualify them for the enhanced mandatory minimum penalties in the proposal. The future impact of this shift in law enforcement resources cannot be quantified; therefore, the impact of the proposal on prison bed space may be higher than that shown above.

Local adult correctional facilities. Because some offenders will be serve prison sentences instead of jail terms, the proposal is expected to decrease local-responsible (jail) bed space needs. The impact is estimated to be one fewer jail bed statewide by FY2013, for a savings to the state of \$15,304 and \$14,150 to the localities.

Estimated Six-Year Impact in Local-Responsible (Jail) Beds

FY08	FY09	FY10	FY11	FY12	FY13
-1	-1	-1	-1	-1	-1

Adult community corrections resources. The proposal is not expected to increase the need for adult community corrections resources and will likely delay the need for services for most offenders affected by the proposal, as many will be required to serve mandatory terms longer than the terms currently served by offenders convicted of these crimes.

Virginia's sentencing guidelines. Currently, offenses affected by the proposal are not covered by the sentencing guidelines as the primary (or most serious) offense in a sentencing event. However, convictions under this statute may augment the guidelines recommendation if a covered offense is the most serious at conviction. The Virginia Criminal Sentencing Commission has recommended to the 2007 General Assembly that offenses defined in §§ 18.2-374.1, § 18.2-374.1:1 and 18.2-374.3 be added to the sentencing guidelines beginning July 1, 2007.

Juvenile correctional centers. According to the Department of Juvenile Justice (DJJ), the proposal is not expected to increase juvenile correctional center (JCC) bed space needs.

Juvenile detention facilities. The Department of Juvenile Justice (DJJ) reports that the proposal is not expected to increase the bed space needs of juvenile detention facilities.

Pursuant to § 30-19.1:4, the estimated amount of the necessary appropriation is at least \$1,322,375 for periods of imprisonment in state adult correctional facilities and is \$0 for periods of commitment to the custody of the Department of Juvenile Justice.

Assumptions underlying the analysis include:

General Assumptions

1. State and local responsibility is based on § 53.1-20 as analyzed for the Secretary's Committee on Inmate Forecasting in 2006.
2. New cases representing state-responsible sentences were based on forecasts developed for the Secretary's Committee on Inmate Forecasting and approved in July 2006.
3. Cost per prison bed was assumed to be \$25,709 per year as provided by the Department of Planning and Budget to the Commission pursuant to § 30-19.1:4. *Where the estimated bed space impact included a portion (or fraction) of a bed, a prorated cost was included in the estimated amount of necessary appropriation.*
4. Cost per jail bed was based on The Compensation Board's FY2005 Jail Cost Report. The state cost was calculated from the revenue portion and the resulting sum was \$28.37 per day or \$10,362 per year. The local cost was calculated by using the daily expenditure cost of \$59.24 per inmate (not including capital accounts or debt service) as the base, and subtracting revenues accrued from the state and federal governments, which resulted in \$26.23 per day or \$9,581 per year. *Where the estimated bed space impact included a portion (or fraction) of a bed, a prorated cost was included in the estimate.*
5. The impact of the proposed legislation on criminal provisions, which would be effective on July 1, 2007, is phased in to account for case processing time.

Assumptions relating to sentence lengths

1. The bed-space impact was derived by estimating the difference between expected dates of release under current law and under the proposed legislation. Release dates were estimated based on the average rates at which inmates in Department of Corrections' facilities were earning sentence credits as of December 31, 2005; for sex offenses the rate was 11.3%. Release dates for local-responsible felony convictions were estimated based on data provided by the Compensation Board on the average percentage of time actually served by felons sentenced in FY2003 to local jails; this rate was 89.7%.
2. To gauge the impact of increased penalty structures under the proposal, existing offenses in the *Code of Virginia* with penalty structures matching or nearly matching those proposed were identified. It was assumed that the distribution of sentences under the proposal will be similar to the distribution of sentences for selected crimes having matching or closely matching penalty structures under current *Code*:
 - a. Sentences for existing unclassified felonies carrying a statutory maximum penalty of 20 years were used to estimate sentences for the proposed penalties specifying a maximum of 20 years for crimes under §§ 18.2-374.1:1(B) and 18.2-374.3(D).
 - b. Sentences for existing unclassified felonies carrying a statutory maximum penalty of 30 years (excluding those with mandatory minimum provisions) were used to estimate sentences for the proposed penalties specifying a maximum of 30 years for crimes under §§ 18.2-374.1(B) or 18.2-374.3(C,E).
 - c. Sentences for existing unclassified felonies carrying a statutory maximum penalty of 40 years were used to estimate sentences for the proposed penalties specifying a maximum of 40 years for crimes §§ 18.2-374.1(B) or 18.2-374.3(C).
3. Offenders eligible for a mandatory term under the proposal were treated as having been sentenced to the specified mandatory term, unless the sentence estimated for the case through the process noted above already exceeded the proposed mandatory minimum penalty.
4. Increased statutory minimums may impact future bed space needs through jury sentencing, since juries must impose at least the statutory minimum and may not suspend time from that sentence. Further, judges in most cases do not alter the jury's recommended sentence. In the analysis, sentences were adjusted to reflect the dynamics of jury sentencing using information from the Pre/Post-Sentence Investigation (PSI) database. Sentences were increased to the statutory minimum for the proportion of cases that were sentenced by a jury. For the proportion of cases where the judge suspended some of the jury-imposed time, the jury sentence was reduced by the following ratio: (imposed minus suspended)/imposed time. If the actual sentence already exceeded the proposed statutory minimum penalty, the case was presumed to have no additional impact.