



Fiscal Impact Statement for Proposed Legislation

Virginia Criminal Sentencing Commission

Senate Bill No. 14

Amendment in the Nature of a Substitute (Patron Prior to Substitute – Garrett)

LD#: 14104029

Date: 1/16/2014

Topic: Sodomy

Fiscal Impact Summary:

- **State Adult Correctional Facilities:**
\$50,000 *
- **Local Adult Correctional Facilities:**
Cannot be determined
- **Adult Community Corrections Programs:**
Cannot be determined

- **Juvenile Correctional Centers:**
Cannot be determined
- **Juvenile Detention Facilities:**
Cannot be determined

* The estimated amount of the necessary appropriation cannot be determined for periods of imprisonment in state adult correctional facilities; therefore, Chapter 806 of the 2013 Acts of Assembly requires the Virginia Criminal Sentencing Commission to assign a minimum fiscal impact of \$50,000.

Summary of Proposed Legislation:

The proposed legislation amends § 18.2-361(A), relating to non-forcible sodomy. On March 12, 2013, the United States Court of Appeals for the 4th Circuit issued a decision (*MacDonald v. Moose*, 2013) regarding the constitutionality of Virginia's general prohibition against non-forcible sodomy under § 18.2-361(A). In this case, the court ruled that the portion of § 18.2-361 relating to non-forcible sodomy is unconstitutional because it prohibits sodomy between two individuals without any qualification, which facially violates the Due Process Clause of the Fourteenth Amendment and is inconsistent with existing precedent. Virginia's Attorney General filed a petition for a writ for certiorari in the Supreme Court of the United States, which was denied on October 7, 2013. The proposal removes language in § 18.2-361(A) pertaining to acts of non-forcible sodomy.

The proposal also modifies several statutes involving certain prostitution and sex offenses (§§ 18.2-346, 18.2-348, 18.2-356, 18.2-359, 18.2-370, 18.2-370.1, 18.2-374.3) to explicitly include the acts of anal intercourse, cunnilingus, fellatio, or anilingus; currently, all of these statutes reference the now-defunct § 18.2-361. The proposal also adds the acts of anal intercourse, cunnilingus, fellatio, or anilingus to three other statutes that do not currently reference § 18.2-361; these statutes are: § 18.2-67.5:1 (punishment for a third misdemeanor sex offense), § 18.2-368 (leaving wife for prostitution), and § 18.2-371 (contributing to the delinquency of a minor). Under the proposed modifications to § 18.2-371, adults who engage in consensual sodomy with a minor 15 years of age or older would be guilty of a Class 1 misdemeanor. By adding consensual sodomy with a minor 15 years of age or older to § 18.2-67.5:1, the penalty for this offense would be increased to a Class 6 felony if the offender was previously convicted of two misdemeanor sex offenses listed in this statute within a 10-year period. These penalties would mirror the existing penalties for consensual sexual intercourse with a minor 15 or older. The proposal may remedy the issues expressed in *MacDonald v. Moose* (2013).

Analysis:

According to fiscal year (FY) 2012 and FY2013 Sentencing Guidelines data, 56 offenders were sentenced for non-forcible sodomy in violation of § 18.2-361(A) during this time period. The sodomy conviction was the primary, or most serious, offense in 30 of the cases (see table below). In those 30 cases, 43% of the offenders received a state-responsible (prison) term, with a median sentence of two years. Another 30% were sentenced to a local-responsible (jail) term, with a median sentence of six months, while the remaining 27% did not receive an active term of incarceration to serve after sentencing.

The number of offenders sentenced for non-forcible sodomy declined significantly in FY2013. Currently, no individuals may be convicted for non-forcible sodomy under § 18.2-361(A) due to the Court's decision in *MacDonald v. Moose* (2013).

**Felony Sentencing Events involving
Non-Forcible Sodomy § 18.2-361(A)**

Fiscal Year	As Primary Offense (Most Serious)	As Additional Offense	Total
FY2012	22	14	36
FY2013	8	12	20
Total	30	26	56

Impact of Proposed Legislation:

State adult correctional facilities. The proposal addresses the issues expressed in *MacDonald v. Moose* (2013) by removing language in § 18.2-361(A) pertaining to non-forcible sodomy and inserting the acts of anal intercourse, cunnilingus, fellatio, or anilingus into numerous statutes in the *Code in Virginia* that currently reference § 18.2-361. If the decision in *MacDonald v. Moose* also preempts convictions for behavior relating to sodomy under statutes that reference § 18.2-361, the proposal would allow felony prosecutions and convictions for such acts to resume. Until the effective date of such legislation, however, there may be a period of time during which no one will be convicted for acts relating to non-forcible sodomy that would fall under the now-defunct § 18.2-361. Thus, the proposal may increase the future state-responsible (prison) bed space needs of the Commonwealth above current needs. In addition, the proposal expands certain felony offenses, such as leaving one's wife for prostitution (§ 18.2-368), to include unlawful anal intercourse, cunnilingus, fellatio, or anilingus. The combined effect of these changes cannot be estimated; therefore, the magnitude of the impact on prison bed space needs during the six-year forecast horizon cannot be determined.

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

Adult community corrections programs. Because the proposal could result in new felony convictions and subsequent supervision requirements for some offenders, the proposal may increase the need for adult community corrections resources. The potential impact on community corrections programs, however, cannot be determined.

Virginia's sentencing guidelines. The sentencing guidelines cover felony violations of §§ 18.2-356(i), 18.2-361(A), 18.2-368, 18.2-370(A), 18.2-370.1(A), and 18.2-374.3 when one of these crimes is the primary (most serious) offense in a case. If non-forcible sodomy were no longer defined as a felony, it would not be covered by the sentencing guidelines as the primary offense. No adjustment to the guidelines for the other felony offenses affected by the proposed amendments would be necessary under the proposal.

Juvenile correctional centers. According to the Department of Juvenile Justice (DJJ), the impact of the proposal on juvenile correctional center (JCC) 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 806 of the 2013 Acts of Assembly 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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