

Virginia State Crime Commission

Indecent Liberties and Prostitution Offenses Involving Children

2010

Indecent Liberties and Prostitution Offenses Involving Children

Executive Summary

During the 2010 Session of the Virginia General Assembly, Delegate David Bulova introduced House Joint Resolution 97 (HJR 97), directing the Crime Commission to study a number of criminal justice issues connected with the crimes of taking indecent liberties and prostitution-related offenses involving children.¹ Specifically, the Crime Commission was directed to collect and review recent data related to the crimes of indecent liberties, prostitution, prostitution involving children, as well as the failure by employers to pay wages to employees. In addition, the Crime Commission also examined whether any of the recently enacted human trafficking criminal statutes have yet been utilized by prosecutors. To comply with this study request, data was obtained from the Virginia Criminal Sentencing Commission (VCSC), the Virginia Department of Labor and Industry, the Virginia State Police, and the Virginia Department of Juvenile Justice (DJJ).

The information obtained revealed that the majority of defendants who are convicted of the crime of indecent liberties, or indecent liberties committed by a person in a custodial or supervisory relationship (hereinafter referred to as indecent liberties by a custodian), received a punishment involving active incarceration versus probation alone. Of the defendants who received incarceration, slightly more received a prison term (more than 12 months incarceration) than a jail term (12 months or less incarceration). When imposing a sentence for these two crimes, judges are more likely to depart from the recommended sentence provided by the Virginia Sentencing Guidelines than is the reported rate for Sentencing

Guidelines compliance for crimes overall. In particular, judges are more likely to depart upwards from the recommended sentence (i.e., impose a heavier punishment).

The number of prosecutions and convictions for misdemeanor prostitution crimes has remained relatively stable over the past five years. The number of prosecutions and convictions for felony prostitution crimes has remained somewhat stable, and is much lower – there were fewer than fifteen convictions throughout the state in any particular year. The number of juveniles arrested for prostitution or prostitution-related offenses is even smaller, less than five per year. Fewer than ten juveniles a year have formal criminal charges initiated against them for prostitution offenses. Conversations with DJJ staff support these figures; anecdotally, very few juveniles who are discovered to have engaged in prostitution are formally charged. Instead, every effort is made by staff to provide these juveniles with appropriate counseling and treatment.

While the Virginia Department of Labor and Industry receives over five hundred complaints per year that are deemed valid from employees who have not been paid by their employers, almost none of these cases are prosecuted criminally under Va. Code § 40.1-29. Further, the national origin or immigration status of individuals who file such complaints is not collected. Finally, the three recently enacted criminal offenses aimed at combating human trafficking, Va. Code §§ 18.2-59(iii), 18.2-59(iv), and 18.2-47(B), do not appear to have been used; the VCSC reports that there have been no prosecutions or convictions for these crimes.

Background and Analysis

Indecent Liberties and Indecent Liberties
Committed by a Custodian

House Joint Resolution 97 directed the Crime Commission to examine:

- Why statutes prohibiting taking indecent liberties with children, including Va. Code §§ 18.2-370 and 18.2-370.1, are not being utilized to their fullest extent;
- To what extent fines are being assessed on those who violate the statutes prohibiting taking indecent liberties with children, including Va. Code §§ 18.2-370 and 18.2-370.1;
- The best ways to ensure that statutes prohibiting taking indecent liberties with children, including Va. Code §§ 18.2-370 and 18.2-370.1, are utilized to their fullest extent; and,
- The need for legislative change or need to adjust state sentencing guidelines to ensure that statutes prohibiting taking indecent liberties with children, including Va. Code §§ 18.2-370 and 18.2-370.1, are utilized to their fullest extent.²

While the phrase “utilized to their fullest extent” could refer to either the number of charges that are brought each year, or the penalties that are imposed upon conviction, the recitals in the body of the resolution imply the latter meaning is the intended focus. Recognizing that there is no benchmark by which to determine whether or not sufficient time is imposed upon defendants convicted of these crimes, data was gathered from the VCSC to ascertain what prison sentences have been imposed, on average, during Fiscal Years (FY) 2005 to 2009, compared with FY02 and FY03.

Total Number of Sentencing Events

The total number of sentencing events for both indecent liberties, in violation of Va. Code § 18.2-370, and indecent liberties by a

custodian, in violation of Va. Code § 18.2-370.1, are as follows:³

Figure 1: Number of § 18.2-370 Indecent Liberties Sentencing Events, FY07-09

§ 18.2-370	FY 07	FY 08	FY 09	Total
As Primary Offense	104	73	63	377
As Additional Offense*	33	73	65	231
Total Sentencing Events	137	146	128	608

Source: Virginia Criminal Sentencing Commission-Sentencing Guidelines Database

Figure 2: Number of § 18.2-370.1 Indecent Liberties Sentencing Events, FY07-09

§ 18.2-370.1	FY 07	FY 08	FY 09	Total
As Primary Offense	62	49	60	299
As Additional Offense*	26	40	42	193
Total Sentencing Events	88	89	102	492

Source: Virginia Criminal Sentencing Commission-Sentencing Guidelines Database

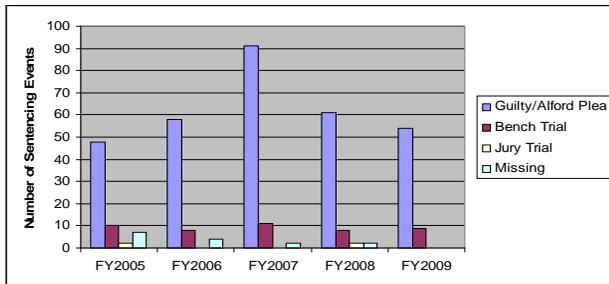
These figures are not directly comparable to the number of convictions in FY02 and FY03 that are referenced in HJR 97. The figures provided in the recitals of HJR 97 only refer to first time convictions for each crime, not subsequent convictions, and do not include convictions for violations of subsection B of Va. Code § 18.2-370.⁴ A more accurate comparison would involve, for the recent figures, only violations of subsection A of Va. Code § 18.2-370 and subsection A of Va. Code § 18.2-370.1, and only in those instances where the indecent liberties offense was the primary offense as illustrated in Figures 1 and 2 above.

These figures reveal that while there is some variation from year to year, the total number of sentencing events for these offenses is relatively stable, and roughly comparable to the numbers given in HJR 97 for FY02 and FY03.

Type of Trial

Additional data from the VCSC revealed that the vast majority of these sentencing events resulted from a guilty plea, rather than a bench trial or a jury trial. From FY05 to FY09, for the 377 sentencing events involving a violation of Va. Code § 18.2-370(A), 83% (312 of 377) came after a guilty plea; 12% (46 of 377) came after a bench trial; and 1% (4 of 377) came after a jury trial. In 4% of the cases (15 of 377), data on this point was missing.

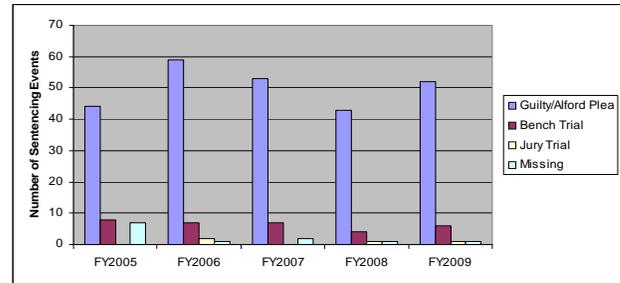
Figure 3: Type of Trial, § 18.2-370(A) as Primary Offense



Source: Virginia Criminal Sentencing Commission-Sentencing Guidelines Database

From FY05 to FY09, for the 299 sentencing events involving a violation of Va. Code § 18.2-370.1(A), 84% (251 of 299) came after a guilty plea; 11% (32 of 299) came after a bench trial; and 1% (4 of 299) came after a jury trial. In 4% of cases (12 of 299), data on this point was missing.

Figure 4: Type of Trial, § 18.2-370.1(A) as Primary Offense

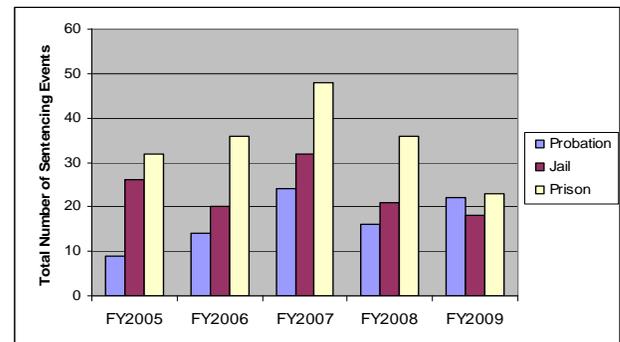


Source: Virginia Criminal Sentencing Commission-Sentencing Guidelines Database

Type of Disposition

Examining the types of dispositions received in these cases, for the 377 sentencing events from FY05 to FY09 that involved a violation of Va. Code § 18.2-370(A), 46% (175 of 377) resulted in an active prison sentence; 31% (117 of 377) resulted in an active jail sentence; and 23% (85 of 377) resulted in probation, with no active incarceration.

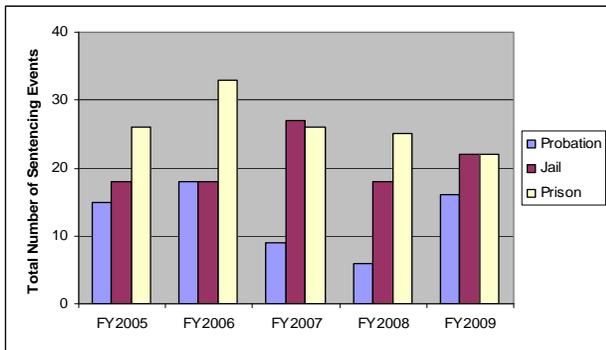
Figure 5: Type of Disposition, § 18.2-370(A), FY2005-FY2009



Source: Virginia Criminal Sentencing Commission-Sentencing Guidelines Database

For the 299 sentencing events from FY05 to FY09 that involved a violation of Va. Code § 18.2-370.1(A), 44% (132 of 299) resulted in an active prison sentence; 34% (103 of 299) resulted in an active jail sentence; and 21% (64 of 299) resulted in probation, with no active incarceration.

**Figure 6: Type of Disposition,
§ 18.2-370.1(A), FY2005-FY2009**



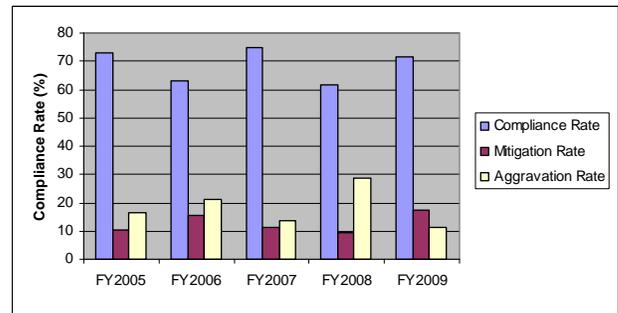
Source: Virginia Criminal Sentencing Commission-Sentencing Guidelines Database

In an effort to determine what fines are imposed upon defendants convicted of indecent liberties, and indecent liberties by a custodian, a request was made to the VCSC for this data. The Sentencing Commission reported that this information was recorded on less than half of all received reports. With such low reported numbers, the data for this topic must be regarded as incomplete and therefore unreliable. No accurate evaluations can be made due to these limitations.

Adherence to Sentencing Guidelines

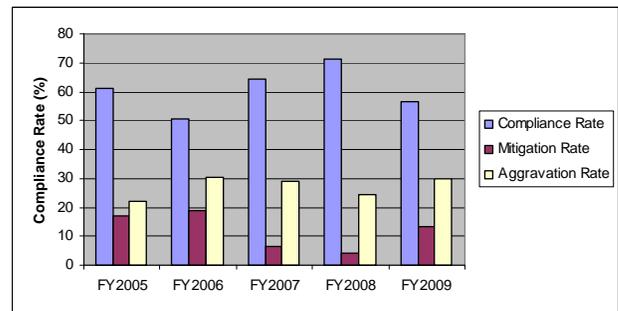
Data was requested from the VCSC to determine how frequently the sentence imposed on these defendants, whether prison time, jail time, or probation, was the sentence recommended by the Sentencing Guidelines. For both offenses, and in every year, the actual sentence imposed complied with the Sentencing Guidelines recommendation about 70% of the time, or less. It is important to note that the overall rate of compliance for all crimes is very close to 80%.⁵ In other words, judges more frequently depart from the Sentencing Guidelines when it comes to the crimes of indecent liberties and indecent liberties by a custodian, than they do for other crimes.

**Figure 7: VCSC Guidelines Compliance Rate,
§ 18.2-370(A), FY2005-FY2009**



Source: Virginia Criminal Sentencing Commission-Sentencing Guidelines Database

**Figure 8: VCSC Guidelines Compliance Rate,
§ 18.2-370.1(A), FY2005-FY2009**



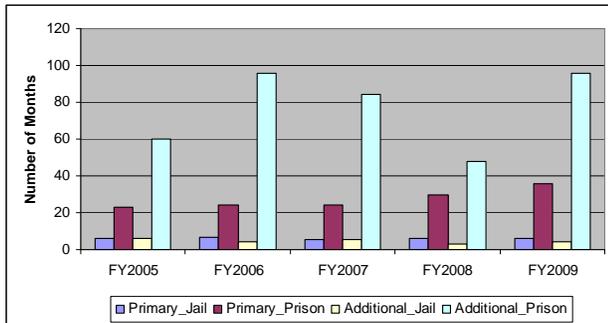
Source: Virginia Criminal Sentencing Commission-Sentencing Guidelines Database

As Figures 7 and 8 demonstrate, for the crimes of indecent liberties and indecent liberties by a custodian, when judges depart from the recommended sentence, it is more likely that the departure will be upwards, and the defendant will receive a heavier sentence. The data shows this tendency to be true for every year over the past five Fiscal Years, with only one exception – the crime of indecent liberties, in violation of Va. Code § 18.2-370(A), in FY09. This tendency for judges to depart upwards is noteworthy, because for criminal sentences overall, when judges depart from the Sentencing Guidelines, it is close to an even split on whether the departure is upwards or downwards.⁶

Length of Sentences

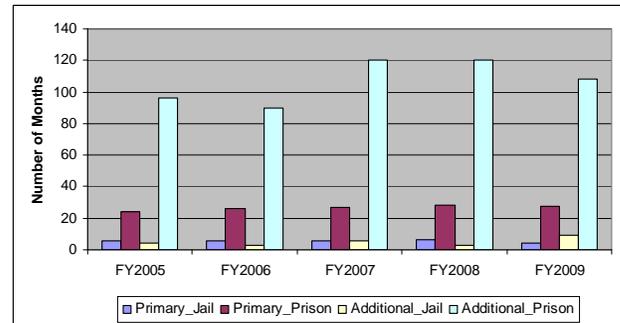
When examining the actual sentences themselves, the data revealed that there is an enormous difference in the amount of time a defendant receives when the crime of indecent liberties, or indecent liberties by a custodian, is the primary offense of the sentencing event, versus when those crimes are additional offenses. As the charts below demonstrate, when those crimes are additional offenses, the amount of active incarceration the defendant receives is typically four times as long. This is not surprising, as the two most usual crimes involved in a sentencing where indecent liberties, or indecent liberties by a custodian, are additional offenses, are rape and aggravated sexual battery. The very grave nature of these crimes, and their higher penalties, led to far lengthier periods of incarceration.

Figure 9: Comparison of Median Jail and Prison Time, § 18.2-370(A) Class 5 Felonies as Primary versus as Additional Offense



Source: Virginia Criminal Sentencing Commission-Sentencing Guidelines Database

Figure 10: Comparison of Median Jail and Prison Time, § 18.2-370.1(A) as Primary versus as Additional Offense



Source: Virginia Criminal Sentencing Commission-Sentencing Guidelines Database

Prostitution

House Joint Resolution 97 also directed the Crime Commission to examine:

- How many prosecutions have been brought against those who take or detain a person for prostitution (pimps) under Va. Code §§ 18.2-355, 18.2-356, or 18.2-357 or any other pandering/pimping-related offense over the past five years;
- How many prosecutions have been brought against solicitors of prostitution (johns) under Va. Code § 18.2-346 or any other prostitution-related offense over the past five years; and,
- How many prosecutions have been brought against women or men for prostitution under Va. Code § 18.2-346 or any other prostitution-related offense over the past five years.

There are five statutes in Virginia that are related to pandering/pimping: (1) Va. Code § 18.2-355 (detaining a person for purposes of prostitution); (2) Va. Code § 18.2-356 (receiving money for procuring a prostitute); (3) Va. Code

§ 18.2-357 (receiving money from a prostitute); (4) Va. Code § 18.2-348 (aiding of prostitution); and, (5) Va. Code § 18.2-368 (forcing one's wife to act as a prostitute). All of these offenses are felonies, except for Va. Code § 18.2-348, which is a Class 1 misdemeanor. There are three prostitution solicitation offenses in Virginia: (1) Va. Code § 18.2-346(B) (solicitation of a prostitute); (2) Va. Code § 18.2-347 (visit, or reside in, or keep, a bawdy place); and, (3) Va. Code § 18.2-349 (use of a vehicle for prostitution).⁷ All of these offenses are Class 1 misdemeanors. There is only one prostitution statute in Virginia: Va. Code § 18.2-346(A), which is a Class 1 misdemeanor.⁸

General District Court, Charges and Prosecutions

To obtain these figures, staff requested data from the VCSC regarding the number of misdemeanor prostitution charges, overall, that were prosecuted in general district courts over the past five FY. The number of charges has remained fairly consistent from year to year. There were:

- In FY07, 1,270 charges involving 1,036 defendants;
- In FY08, 976 charges involving 811 defendants; and,
- In FY09, 1,037 charges involving 834 defendants.

The number of sentencing events for these crimes, presented by year and with specific offense information, is provided in Figure 11.

Figure 11: Number of Misdemeanor Prostitution Sentencing Events, FY07-FY09

Type of Offense	FY07	FY08	FY09
§ 18.2-346(A) Prostitution for money	276	219	241
§ 18.2-346(B) Solicitation for prostitution	261	134	187
§ 18.2-347 Maintain or frequent bawdy place	34	25	32
§ 18.2-348 Aid or assist in procurement of prostitute	12	14	28
§ 18.2-349 Use vehicle to promote prostitution	2	5	9
General misdemeanor prostitution (Type cannot be determined from available data)	251	176	250
Total Sentencing Events	836	573	747

Source: Virginia Criminal Sentencing Commission

The number of felony prostitution charges brought in general district courts over this same time period is much smaller. There were 30 felony charges brought in FY05, 28 in FY06, 38 in FY07, 42 in FY08, and 54 in FY09. Of these charges, 5 were certified to a circuit court in FY05, 8 were certified in FY06, 11 were certified in FY07, 14 were certified in FY08, and 14 were certified in FY09. The number of defendants who were charged with a felony prostitution offense in a general district court during this time period is correspondingly small.

Circuit Court, Charges and Prosecutions

The number of felony indictments for a felony prostitution offense in circuit courts during this time period is slightly larger, indicating that prosecutors will occasionally direct indict for these offenses. There were 21 felony indictments, involving 8 defendants, in FY05; 20 felony indictments, involving 14

defendants, in FY06; 47 felony indictments, involving 18 defendants, in FY07; 20 felony indictments, involving 11 defendants, in FY08; and 14 felony indictments, involving 14 defendants, in FY09.⁹ The number of felony convictions for prostitution offenses (as primary and as additional offenses) is largest for the crime of pandering as seen in Figure 12.

Figure 12: Total Number of Felony Prostitution Sentencing Events, FY07-FY09

Type of Offense	FY07	FY08	FY09
§ 18.2-355(1) Enticement/procurement	0	0	1
§ 18.2-355(2) Compel to marry by force/threats	0	0	0
§ 18.2-355(3) Parent permitting child	0	0	1
§ 18.2-356 Receive money for procurement	1	1	0
§ 18.2-357 Pander, pimp or receive money from prostitute	7	2	11
§ 18.2-368 Place or leave wife for prostitution	0	0	0
Total Sentencing Events	8	3	13

Source: Virginia Criminal Sentencing Commission

Child Prostitution

House Joint Resolution 97 directed the Crime Commission to examine:

- How many children have been arrested for violating Va. Code § 18.2-346, for being a prostitute, for prostitution, or for any other prostitution-related offense over the past five years; and
- The process a child goes through if that child is arrested for violating Va. Code § 18.2-346, for being a prostitute, for prostitution, or for any other prostitution-related offense.

The Virginia State Police provided information for all juveniles arrested for any prostitution-related offenses over the past five years. There were only two arrests in Calendar Year (CY) 2005; one arrest in CY06; three arrests in CY07; four arrests in CY08; and, one arrest in CY09. In an effort to determine if perhaps juveniles discovered to be engaging in prostitution were not formally arrested by the police, but were still proceeded against with criminal charges, DJJ was also contacted. According to their records, there were only eight juveniles who had criminal petitions taken out against them for prostitution-related offenses in FY06; two juveniles in FY07; seven juveniles in FY08; four juveniles in FY09; and, three juveniles in FY10. None of these petitions resulted in a conviction or adjudication of delinquency. The available data therefore indicates that few instances of child prostitution result in the criminal prosecution of the child. Anecdotal evidence, based upon conversations with staff at DJJ, and the Child Protective-Services Unit of the Virginia Department of Social Services, also indicates that very few juveniles are discovered, by authorities, to be engaging in prostitution.

In order to verify that child prostitution is not common in Virginia, at least as can be determined by documented evidence, a general request for information on this topic was made to DJJ. This led to an informal survey being sent to the thirty-five Juvenile and Domestic Relations Court Service Units (CSUs), which asked if they had encountered any instances of child prostitution recently. Nineteen of the CSUs responded; of those, eight reported no juvenile arrests or encounters with juvenile prostitution. The remaining eleven reported limited encounters with child prostitution, but no more than a few instances over the course of several years, with no more than one to four cases in any given year.

Conversations with DJJ staff revealed documented instances of juvenile prostitution were rare, but when they were discovered, every

effort was made to provide the juvenile with counseling and services. Prostitution is typically associated with a larger problem behavior, such as drug addiction, gang affiliation, or being a chronic run-away. By offering services and support for these larger behavioral problems, every attempt is made to help provide rehabilitation for the juvenile.

Wage Withholding

House Joint Resolution 97 directed the Crime Commission to examine:

- How many actions have been brought against employers who, willfully and with intent to defraud, fail, or refuse to pay wages under the withholding wages provision in Va. Code § 40.1-29 over the past five years.

The Virginia Department of Labor and Industry was contacted to determine how many complaints have been registered by them of employers who had failed to pay their employees. The following chart provides the data obtained:

Figure 13: Number of Complaints for Failure to Pay Employees, FY05-FY09

Year (CY)	Total Valid	Total Invalid	Total Cases for Year
2005	778	788	1566
2006	671	862	1533
2007	658	813	1471
2008	827	1015	1842
2009	598	992	1590

Source: Virginia Department of Labor and Industry

Invalid claims include those in which the complaining employee failed to provide

requested information to Department, failed to keep in contact with the Department during the investigation, the complaint was not accurate or dealt with a company outside the jurisdiction of the Department (e.g., an out of state company), or the company had gone out of business before the completion of the investigation. The Virginia Department of Labor and Industry does not keep any data on the types of businesses or industries that are the subject of complaints, or the national origin or immigration status of individuals who file complaints.

According to information from the Supreme Court of Virginia's General District Court and Circuit Court Information Systems, as provided by the VCSC, from FY05 to FY09, only three individuals faced felony charges under Va. Code § 40.1-29 for failure to pay wages.¹⁰ There were no convictions. In this time period, there was one misdemeanor conviction, in FY08, for a misdemeanor violation of Va. Code § 40.1-29.

Human Trafficking Offenses

In addition to the specific information requests made by HJR 97, the Crime Commission also contacted the VCSC to determine if there have been any convictions for any of the three recently enacted human trafficking crimes:

- Va. Code § 18.2-59(iii), enacted in 2006, criminalizes extorting another by threatening to report him as being illegally present in the United States;¹¹
- Va. Code § 18.2-59(iv), enacted in 2007, criminalizes extorting another by withholding his passport or other immigration or identification document;¹² and,
- Va. Code § 18.2-47(B), enacted in 2009, criminalizes seizing, transporting, or detaining another with the intent to subject him to forced labor.¹³

Based upon the information received from the VCSC, there have not been any charges, nor any convictions for any of these offenses.

Conclusion

In reviewing the criminal offenses in Virginia that are associated with human trafficking, namely, child prostitution and extortion for purposes of obtaining labor or other services, it appears that there are few, objectively identified cases involving human trafficking which come to the attention of the Virginia criminal justice system. The crimes of indecent liberties, and indecent liberties by a custodian, which are only tangentially connected with this issue, appear to be treated as the serious crimes that they are. The majority of convictions for these offenses result in active incarceration, and of the cases that receive incarceration, slightly more receive a prison sentence than a jail sentence. Judges are more likely to depart from the recommended sentence provided by the Virginia Sentencing Guidelines for these two crimes than for other crimes, and when they depart, it is likely that they will impose a more severe sentence. All of the available data sources indicate that child prostitution is a very rare occurrence in Virginia, at least as far as can be determined by examining the objective numbers available from law enforcement and DJJ. The hard data is supported by anecdotal evidence and interviews with staff at DJJ. While undoubtedly there are juveniles in Virginia who engage in child prostitution, when they are discovered, the tendency throughout the state is to treat them as victims in need of counseling and services, rather than to prosecute them for their prostitution activity. Every effort is made to provide these juveniles with appropriate rehabilitation, usually in the context of the larger problems, such as drug addiction, which led to their engaging in prostitution.

The Crime Commission reviewed these findings at its September 8, 2010, meeting. As the available information indicates there are no

legislative changes currently needed in Virginia for any of these topics, the Crime Commission made no recommendations as a result of this study.

¹ H.J.R. 97, 2010 Gen. Assem., Reg. Sess. (Va. 2010).

² *Id.*

³ A sentencing event consists of all offenses (and counts) for which an offender is sentenced before the same court at the same time. See VIRGINIA SENTENCING GUIDELINES, “General Instructions” (2010).

⁴ Subsection B of Va. Code § 18.2-370 was not enacted until 2005. 2005 Va. Acts chs. 185, 762. That offense, involving child pornography, was not a part of indecent liberties in FY02 or FY03. The penalties referred to in HJR 97, namely, Class 5 felonies for violations of indecent liberties, and Class 6 felonies for violations of indecent liberties by a parent or guardian, are only applicable to first offenses. A second violation of indecent liberties was, and is today, a Class 4 felony, while a second violation of indecent liberties by a parent or guardian was, and is today, a Class 5 felony. VA. CODE ANN. §§ 18.2-370(C), 18.2-370.1(B) (Michie 2010).

⁵ *Guidelines Compliance*, VCSC ANN. REP. (2009), at 18.

⁶ For example, in FY09, 49.7% of departures were upwards, and 50.3% of departures were downwards. *Guidelines Compliance*, VCSC ANN. REP. (2009), at 18.

⁷ While Va. Code §§ 18.2-347 (visit or keep a bawdy place) and 18.2-349 (use of a vehicle for purposes of prostitution) can be used against pimps or people who manage prostitutes, they are more commonly used against people who solicit prostitutes.

⁸ While prostitutes may be charged with additional criminal offenses, such as sodomy or attempted sodomy, these are not crimes of prostitution, strictly speaking, and therefore fall outside the specific scope of this study.

⁹ As stated earlier, the original source for this information was the Supreme Court of Virginia’s circuit court Automated Information System. The circuit courts of Alexandria, Fairfax, and Prince William County did not participate in this system during the years in question. They were contacted individually; the figures for the circuit courts of Alexandria and Fairfax have been included in the listed totals. The figures for the circuit court of Prince William County were not readily available.

¹⁰ In order for the failure to pay wages to rise to the level of a felony, the amount of the withheld wages

must be \$10,000 or more; otherwise, the offense is a Class 1 misdemeanor. VA. CODE ANN. § 40.1-29(E) (Michie 2010).

¹¹ 2006 Va. Acts ch. 313.

¹² 2007 Va. Acts chs. 453, 547.

¹³ 2009 Va. Acts ch. 662.