

**REPORT OF THE
JOINT COMMISSION ON HEALTH CARE**



**EMPLOYMENT EXCEPTIONS FOR
NURSING FACILITY EMPLOYEES**

(HB 2748)

**TO THE CHAIRMAN OF THE SENATE COMMITTEE ON
EDUCATION AND HEALTH**

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Preface

House Bill 2748, as passed as a floor substitute by the House of Delegates would have allowed individuals who have been convicted of not more than one felony relating to assaults and bodily wounding related to a domestic dispute to be screened for potential employment by a nursing home. The bill would have required the Department of Health to establish a screening process for these individuals. While the bill was passed by the House of Delegates, the Senate Committee on Education and Health referred the bill to the Joint Commission on Health Care for further study.

Based on our research and analysis during this review, we concluded the following:

- Federal law does not mandate criminal background checks for nursing home staff, but most states require some type of background check.
- In Virginia, nursing homes are required within 30 days of employing an individual to obtain an “original criminal record clearance...or an original criminal history record from the Central Criminal Records Exchange (*Code of Virginia* § 32.1-126.01). The Exchange includes the names and fingerprints of all individuals arrested for a class 1 or 2 misdemeanor (the two most serious classes of misdemeanors) or any felony committed in Virginia.
- Nursing homes in Virginia are not required to obtain national criminal records checks on employees. Employment applicants are required to provide “a sworn statement or affirmation disclosing any criminal charges, whether within or without the Commonwealth....” Nursing homes, like other care-giving organizations, have been authorized in statutory provisions (*Code of Virginia* § 19.2-392.02) to request national criminal background checks through the Virginia Department of State Police.
- Barrier crime statutes contained in the *Code of Virginia* include 29 barrier crimes that apply to nursing homes; however, far fewer (13) barrier crimes apply to individuals working in assisted living facilities. (It is expected that the Code Commission will introduce legislation during the 2002 General Assembly session to recodify Title 63.1 as Title 63.2 of the *Code*. The recodification bill draft includes provisions that will make the barrier crimes for assisted living facilities consistent with those for nursing homes.) Barrier crimes for nursing homes are generally consistent with the barrier crimes established for facilities licensed by the Department of

Mental Health, Mental Retardation and Substance Abuse Services (DMHMRSAS) and for child welfare agencies. However, three types of crimes – burglary, felony distribution and felony possession of drugs – are barrier crimes for DMHMRSAS and child welfare agencies but not for nursing homes.

- HB 2748 was introduced to address a situation involving an individual who was convicted of unlawful wounding which occurred during a domestic dispute. Two former employers described the individual as a very good caregiver and employee. However, because of the barrier crime statutes, the individual is prohibited from being employed as a caregiver in a nursing home or assisted living facility.
- HB 2748 provided for a screening mechanism that would allow the Virginia Department of Health (VDH) to assess whether applicants for nursing home employment are rehabilitated and “are not a risk to residents of the nursing home based on their criminal history backgrounds.” VDH representatives indicated concerns about the Health Department being responsible for making such assessments.
- Representatives of a number of long-term care organizations indicated their opposition to the provisions of HB 2748. Concerns included that a felony assault conviction is a serious offense, that no mechanism for ensuring the caregiver had been rehabilitated is spelled out, and that increasing the professionalism of nursing home caregivers is not enhanced by reducing job qualifications.

A number of policy options were offered for consideration by the Joint Commission on Health Care regarding the issues discussed in this report. These policy options are listed on page 19. Public comments were solicited on the draft report. A summary of the public comments is attached at Appendix C.

On behalf of the Joint Commission on Health Care and its staff, I would like to thank the Virginia Department of Health, the Virginia Department of State Police, the Office of the State Long-Term Care Ombudsman, the Virginia Association of Nonprofit Homes for the Aging, the Virginia Health Care Association, the Virginia Hospital and Healthcare Association, Margaret Edds of the *Virginian Pilot* and the other agencies and associations who provided input and information during this study.


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Executive Director

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I. Authority for the Study

House Bill (HB) 2748, as introduced during the 2001 General Assembly Session amended *Code of Virginia* § 32.1-126.01 which delineates specific types of criminal convictions that serve as barrier crimes for individuals who want to work in a nursing home. HB 2748 provided an exemption to one of those barrier crimes to allow “an applicant who has been convicted of one felony relating to assaults and bodily woundings...related to a domestic dispute” to be employed by a nursing home. HB 2748, as amended in the form of a substitute, required the Virginia Department of Health (VDH) to establish a screening process to evaluate whether applicants meeting the aforementioned description had been rehabilitated and were not risks to the nursing home residents. This amended form of HB 2748 was passed by the House of Delegates.

HB 2748 was subsequently passed by with a letter by the Senate Committee on Education and Health. The Senate Committee approved a motion to request that the Joint Commission on Health Care (JCHC) consider the bill provisions. The letter from the chairman of the Senate Committee on Education and Health states:

House Bill 2748 “would have required the Department of Health to screen prospective applicants who have been convicted of a barrier crime relating to domestic violence to determine if the person has been successfully rehabilitated and is not a risk to nursing home residents. This bill was motivated by a case involving a woman who is reportedly a good caregiver but who cannot work in nursing homes because of a conviction relating to domestic violence. Testimony indicated that there are many people who fall in this category and that, in view of the nursing shortage, some consideration of the issues presented by HB 2748 might be helpful. Therefore, when the motion to pass by HB 2748 was made, the Committee included a request for the Long-Term Care Subcommittee of the Joint Commission on Health Care to examine the provisions of HB 2748 (as introduced and as engrossed). Thus on behalf of the members of the Senate Committee on Education and Health, I respectfully ask that the Joint Commission on Health Care include HB 2748 and its related issues in its 2001 study plan and that

the Joint Commission inform the Senate Committee on Education and Health of its findings as soon as practicable.”

A copy of this letter is included in Appendix A and a copy of HB 2748 as introduced and as engrossed by the House of Delegates are included in Appendix B.

Organization of Report

The report is presented in four major sections. This section discussed the authority for the study. Section II presents information regarding the criminal background checks that are required in federal and state law for nursing home employees. Section III discusses the possible need for a screening mechanism to determine whether certain individuals who have committed a specific type of barrier crime should be allowed to work as caregivers. Section IV provides a series of policy options the Joint Commission on Health Care may wish to consider in addressing the issues raised in this study.

II. Background

Federal Legislation Does Not Require Criminal Records Checks or Specify Barrier Crimes for Nursing Home Employees Although Two Bills Have Been Introduced to Require Employee Background Checks and to Specify Barrier Crimes

Currently, federal law does not require the completion of criminal records checks or specify barrier crimes for nursing home employees. Two bills have been introduced during this Session of the United States Congress that would require background checks and establish barrier crimes.

Senate legislation (S. 1054) generally referred to as "The Patient Abuse Prevention Act" was introduced on June 14, 2001. S. 1054 would amend "titles XVIII (Medicare) and XIX (Medicaid) of the Social Security Act (SSA) to establish programs to prevent abuse of recipients of home health or long-term care services in skilled nursing facilities (SNFs) or other long-term care facilities under the Medicare and Medicaid programs, including background checks on workers and a hiring ban on abusive workers." The bill provisions that are specific to background checks require that as a condition of employment, each worker would be required to: (1) report in writing any conviction for a prohibited crime or any finding of resident abuse, (2) authorize the facility to complete a criminal records check, and (3) provide a fingerprint or thumb print and identification documents. The nursing facility would be required to request a state and national criminal background check on each worker. Prohibited crimes include offenses described in *Social Security Act* Title XI Section 1128(a) and "such other offenses as the Secretary [of Health and Human Services] may specify in regulations, taking into account the severity and relevance of such offenses...." SSA Section 1128(a) currently applies to health care providers and facilities as opposed to employees of health care providers. The Section language dictates that providers and facilities will be excluded from participating in federal health care programs for four broad types of offenses:

- convictions related to criminal offenses committed in the course of providing goods or services paid for by a federal or state health care program;
- convictions involving patient abuse or neglect;
- felony convictions related to health care fraud that involved federal, state, or local funding; and
- felony convictions involving controlled substances.

House legislation (H.R. 2677), generally referred to as “The Nursing Home Quality Protection Act of 2001,” was introduced on July 30, 2001. Supporters indicate this legislation was developed in response to the findings of recent studies by the General Accounting Office, the U.S. Department of Health and Human Services, and the Special Investigations Division of the Minority Staff of the House Government Reform Committee. Those studies found that nursing homes frequently had serious health and safety violations, and resident abuse and neglect reports.

H.R. 2677 would amend the *Social Security Act* to include a number of provisions designed to improve quality of care within nursing homes. Those provisions include requirements for background checks for caregivers and offenses that would prevent individuals from working as caregivers in a nursing home. H.R. 2677 does not specify the type of background check (state or national) that should be conducted choosing instead to require the Secretary of Health and Human Services to establish uniform procedures by regulation. Prohibited offenses would include documented “resident or patient abuse, misappropriation of resident or patient property, or child abuse” as well as any offense as established in regulation by the Secretary of Health and Human Services.

It is too early in the two-year session of Congress to determine whether either S. 1054 or H.R. 2677 will be enacted and what form that enactment might take. If either bill is enacted in its current form, however, its provisions could prevent Virginia from allowing the exceptions to barrier crimes that are envisioned in HB 2748. At this time, however, there is nothing in federal legislation that would prevent Virginia from allowing barrier crime exceptions.

The *Code of Virginia* Specifies Crimes that Serve as Barriers to Employment within Nursing Homes

Code of Virginia § 32.1-126.01 delineates specific types of criminal convictions that serve as barrier crimes for individuals who want to work in a nursing home. The General Assembly over the course of almost ten years has refined the list of barrier crimes which are designed to assist in protecting nursing home residents by barring individuals with a criminal history from working in nursing homes. Twenty-nine types of crimes are specified as barrier crimes including both felonies and misdemeanors.

Figure 1 compares the barrier crimes that are statutorily defined for nursing homes, assisted living facilities, facilities licensed by the Department of Mental Health, Mental Retardation and Substance Abuse Services (DMHMRSAS), and child welfare agencies. (Child welfare agencies include child day care homes and centers, child-placing agencies, child-caring institutions, and foster homes for children.)

As Figure 1 illustrates, there is a great deal of consistency in the delineation of barrier crimes for nursing homes, DMHMRSAS facilities, and child welfare agencies. However, convictions for burglary, felony distribution of drugs, and felony possession of drugs are not specified as barrier crimes for nursing homes. The fewest number of barrier crimes (13) applies to employees of assisted living facilities. In all four types of facilities; however, felony assaults and bodily woundings, the types of crime addressed in HB 2748, are considered to be barrier crimes.

The *Code of Virginia* Requires Nursing Homes to Obtain State-Specific Criminal Records Checks for their Employees

Code of Virginia § 32.1-126.01 requires nursing homes “within thirty days of employment, [to] obtain for any compensated employees an original criminal record clearance...or an original criminal history record from the Central Criminal Records Exchange” (CCRE). The CCRE, which is maintained by the Virginia Department of State Police, includes the names and fingerprints of all individuals arrested for a class 1 or 2 misdemeanor (the two most serious classes of misdemeanors) or any felony committed in Virginia. The CCRE includes both the offense for which the individual was arrested as well as the subsequent judicial finding and any sentence resulting from the arrest.

**Figure 1
Types of Convictions Which Preclude Compensated Employment**

Types of Crimes	Nursing Home (§ 32.1-126.01)	Assisted Living Facility (§ 63.1-173.2)	DMHMRSAS Facility (§ 37.1-183.3)	Child Welfare Agency (§ 63.1-198.1)
Murder, Manslaughter	✓	✓	✓	✓
Malicious Wounding by Mob	✓		✓	✓
Abduction	✓		✓	✓
Abduction for Immoral Purposes	✓	✓	✓	✓
Assaults and Bodily Woundings	✓	✓	✓	✓
Robbery	✓	✓	✓	✓
Car Jacking	✓		✓	✓
Extortion by Threat	✓		✓	✓
Felony Stalking	✓		✓	✓
Sexual Assault	✓	✓	✓	✓
Arson	✓	✓	✓	✓
Drive By Shooting	✓		✓	✓
Use of a Machine Gun in Crime of Violence	✓		✓	✓
Aggressive Use of Machine Gun	✓		✓	✓
Use of Sawed-Off Shotgun in Crime of Violence	✓		✓	✓
Pandering	✓	✓	✓	✓
Crimes Against Nature Involving Children	✓	✓	✓	✓
Incest	✓		✓	✓
Taking Indecent Liberties with Children	✓	✓	✓	✓
Abuse and Neglect of Children	✓	✓	✓	✓
Failure to Secure Medical Attention for Injured Child	✓	✓	✓	✓
Specified Obscenity Offenses	✓	✓	✓	✓
Possession of Child Pornography	✓		✓	✓
Electronic Facilitation of Pornography	✓		✓	✓
Abuse or Neglect of Incapacitated Adult	✓	✓	✓	✓
Employing or Permitting Minor to Assist in Specific Obscenity Offenses	✓		✓	✓
Delivery of Drugs to Prisoners	✓		✓	✓
Escape from Jail	✓		✓	✓
Specified Felonies by Prisoners	✓		✓	✓
Burglary			✓	✓
Felony Distribution of Drugs			✓	✓
Felony Possession of Drugs			✓*	✓
Any Other Felony Within Five Years of Employment Application				✓
Founded Complaint of Child Abuse or Neglect				✓**

*Felony drug possession would not preclude employment within a DMHMRSAS facility if the conviction was at least five years prior to the employment application and if the individual was no longer serving probation or parole and had paid any mandatory court costs.

**Child abuse/neglect complaints involve administrative findings rather than criminal convictions.

Source: JCHC staff analysis of *Code of Virginia* provisions.

Nursing homes in Virginia are not required to obtain national criminal records checks on employees. Employment applicants are required to provide “a sworn statement or affirmation disclosing any criminal charges, whether within or without the Commonwealth. Any person making a materially false statement...regarding any such offense shall be guilty upon conviction of a Class 1 misdemeanor.” Nursing homes, like other care-giving organizations, have been authorized in statutory provisions (*Code of Virginia* § 19.2-392.02) to request national criminal background checks through the Virginia Department of State Police. The Department of State Police submits the fingerprints to the Federal Bureau of Investigation (FBI) to be compared with fingerprints maintained in the FBI’s Fingerprint Identification Records System, a national data base.

III. Consideration of the Need for Employment Exceptions

HB 2748 addresses the idea of establishing a mechanism for considering whether employment applicants who have committed a barrier crime have been rehabilitated and should be given a second chance to work as caregivers in nursing homes. HB 2748 narrowly defines the barrier crimes that would be considered and includes a number of conditions that would have to be met to qualify for this special consideration.

HB 2748 Was Intended to Address the Situation of One Individual Who Was Prohibited from Working as a Caregiver in Virginia

HB 2748 was introduced in response to the circumstances of one individual who was prohibited from working as a caregiver in a nursing home or similar care facility. The circumstances surrounding this individual "Carol" were described in several articles that appeared in *The Virginian Pilot* in January and February of 2001. Figure 2, an excerpt from one of those articles, describes the circumstances that prompted the request for HB 2748.

As noted in Figure 2, because of a conviction of unlawful wounding in 1993, Carol has been barred from working in a nursing home or similar care-giving facility. Two former employers have described Carol as being "a wonderful caregiver" and as "a good, caring employee" and both employers believe Carol deserves another chance. HB 2748 was intended to provide a screening mechanism for individuals, like Carol, who may have been unfairly convicted and have demonstrated that they are trustworthy, to be considered for employment in a nursing or other care-giving facility.

Figure 2

Excerpt from *The Virginian Pilot* Article Describing Impetus for Requesting HB 2748

“Carol...is a single mother of four whose life reflects both a triumphal spirit and the strain and exhaustion that come with a lifetime of poverty.

Over the course of two years, 1996 and 1997, Carol helped care for my father, who was slowly dying from the aftereffects of a stroke. She was a wonderful caregiver. She also was on the nursing-home banned list because in 1993 she had been convicted of an unlawful wounding.

My understanding is that during a fight, Carol cut a boyfriend - one with a documented history of abusing women. She pleaded not guilty to malicious wounding, but she acquiesced to a public defender's recommendation that she accept a three-year sentence for unlawful wounding; the sentence would be suspended for 10 years.

Nothing in the public court record disputes Carol's rendering of the facts. It is not certain, but it is entirely possible that what we have here is a poor woman, fearful of losing her children, who accepted lousy legal advice and will pay for it the rest of her life.

But is there any avenue for a reprieve, based on that possibility? No. None. Nor is anyone authorized to consider the fact that numerous people, not just me, stand ready to testify to Carol's character and nursing skill.

One such person is Lisa Poe, who a week before Christmas had to fire Carol from a job she had held for 13 months in a Richmond home for mentally retarded adults. When an FBI report came back listing the unlawful wounding, Poe had no choice.

‘Losing a good, caring employee like Carol was both frustrating and sad for us,’ Poe wrote in a letter to the legislature.

‘There were no positive benefits to the program and certainly none for Carol and her children.’

As January arrived, Carol was struggling to hold on to her apartment, her car, her life.”

Source: “Eye of the Storm Focuses on State’s Nursing Homes” *The Virginian Pilot*, February 11, 2001.

The Screening Mechanism Provided in HB 2748 Seeks to Determine that Employment Applicants Who Have Committed a Barrier Crime Have Been Rehabilitated

The screening mechanism provided in HB 2748 allows the Virginia Department of Health to “screen prospective applicants [for employment] to assess whether such persons have been successfully rehabilitated and are not a risk to residents of the nursing home based on their criminal history backgrounds....To be eligible for such screening, the applicant must have completed all prison or jail terms; not be under probation or parole supervision, or any suspended sentence; have no pending charges in any locality, have paid all fines, restitution, and court costs for any prior convictions; and have been free of any suspended sentence, parole or

probation for at least seven years for drug convictions and five years for all other convictions. In addition...the prospective applicant shall provide to the state screening contractor a statement from his most recent probation or parole officer, if any, outlining his period of supervision, together with a copy of any pre-sentencing or post-sentencing report in connection with each felony conviction.”

HB 2748 limited consideration for this screening assessment to “a person who has been convicted of not more than one felony relating to assaults and bodily woundings...related to a domestic dispute....” Other than the fact that the legislation was intended to address the circumstances of a specific individual, there does not appear to be any justification for why this type of criminal conviction should be singled out for special consideration.

A Similar Screening Process is Provided in Statute to Allow Former Substance Abusers to Work in Substance Abuse Treatment Facilities for Adults

A similar screening mechanism is authorized in *Code of Virginia* § 37.1-183.3 and applies to applicants for employment in an adult substance abuse treatment facility licensed by DMHMRSAS. The statute allows former substance abusers who have been convicted of burglary of an unoccupied building or of specific drug offenses to be screened for employment suitability. The statutory language allows for a screened applicant to be employed if his conviction was “substantially related to the applicant’s use of substances, and that the person has been successfully rehabilitated and is not a risk to consumers based on his criminal history background and substance use, abuse or addiction histories.” The other criteria for screening eligibility – such as completing all prison or jail terms and probation or parole supervision – are comparable to the provisions of HB 2748. In contrast with HB 2748, however, the screening assessment is performed by the treatment facility and a DMHMRSAS-designated contractor as opposed to the state agency (i.e. VDH) being responsible for the assessment and resulting decision as provided in HB 2748. (The bill allows VDH to contract for the screening assessment but presumably VDH would be responsible for the making the final determination.) One of the reasons given for this exception provision is that some substance abuse treatment experts believe that reformed substance abusers can be very effective substance abuse counselors, and have a better understanding of the problems of substance abuse. There does not appear to be a similar

treatment or quality of care relationship between those persons affected by the exception provision of HB 2748 and nursing home residents.

“The Nursing Home Quality Protection Act of 2001” Provides for a Screening Assessment to Allow for Employment of Caregivers who Have Committed Barrier Crimes

At the federal level, “The Nursing Home Quality Protection Act” (H.R. 2677) as introduced in Congress also provides for a screening assessment to allow employment applicants convicted of certain crimes to be considered for employment. The resolution language allows the Secretary of Health and Human Services to make “limited exceptions” to the proposed barrier crime exclusions “based on the severity of the offense or finding or the period of time that has elapsed since the offense or finding occurred....”

Passage of the Provisions Contained in HB 2748 Is Not Expected to Significantly Address Virginia’s Nursing Shortage

Some testimony presented during Committee hearings on HB 2748 suggested that bill passage would assist in addressing the nursing shortage in Virginia by allowing a number of currently excluded individuals to work as caregivers. However, it is unlikely that a significant number of individuals would be affected since HB 2748 addresses only one barrier crime and establishes rigorous requirements for VDH to use in its screening assessment. If the screening assessment and exemption provision applied to additional offenses, a larger number of individuals would qualify for consideration. Nonetheless, given the relatively small number of persons who may benefit from such a provision, it would have a minimal effect on the current nursing shortage.

Executive Clemency from the Governor of Virginia Is One Means of Redress that Could Be Requested

Executive clemency is one means of redress for convictions that seem to be unfair or overly onerous. *Virginia Constitution* Article V Section 12 provides the Governor of Virginia with the authority “to grant reprieves and pardons after conviction....” An executive pardon would address the particular situation of the individual that HB 2748 was intended to help without opening the screening process to individuals who may be less trustworthy.

Virginia Department of Health Staff Indicated Concerns about Provisions of HB 2748

VDH staff indicated concerns about the provisions of HB 2748 which requires the Health Department to “screen prospective applicants to assess whether such persons have been successfully rehabilitated and are not a risk to residents of the nursing home based on their criminal history backgrounds.” Although the bill allows VDH to contract for screening services, the final determination would remain the responsibility of VDH staff. VDH staff stated that Health Department staff have no experience or knowledge base for making a risk assessment or for determining successful rehabilitation of an individual convicted of a felony.

A Significant Number of Long-Term Care Associations Indicated Opposition to the Provisions of HB 2748

Representatives of a number of long-term care organizations indicated their opposition to the provisions of HB 2748. These organizations included the following:

- Alzheimer’s Association of Northern Virginia,
- Jefferson Area Board for the Aging,
- National Citizens’ Coalition for Nursing Home Reform,
- State Long-Term Care Ombudsman,
- TLC 4 Long-Term Care,
- Virginia Association of Nonprofit Homes for the Aging, and
- Virginia Coalition on Aging.

Although a number of respondents indicated that they were sympathetic to the personal circumstances of the individual being barred from working as a caregiver, they could not support the weakening of protections that are afforded nursing home residents. It was noted that both at the federal and state level the recent direction has been to increase rather than decrease resident protections.

Specific concerns about the provisions of HB 2748 also were noted. Due to the seriousness of the crime, several respondents indicated that felony assault was one crime that should not be considered for exception. Further, the stressful, difficult work of being a caregiver was said to be the type of situation in which you would not want to employ someone with

any history of violent behavior. It was also indicated that the safety of fellow caregivers might be threatened by employing individuals with felony convictions for violent crimes. Several respondents reported that they were uncomfortable because no mechanism for ensuring that the caregiver had been rehabilitated was spelled out in the bill. Moreover, the movement to increase the professionalism of the nursing home caregiver was not seen as being enhanced by reducing job qualifications in this manner.

The State Long-Term Care Ombudsman Summarized Many of the Concerns Expressed by Association Representatives who Opposed Provisions of HB 2748

The State Long-Term Care Ombudsman in written remarks concerning HB 2748 summarized many of the reported concerns in stating:

“It seems clear from the narrowness and specificity of the exception created in this proposed legislation that the introduction of this bill represents an attempt to address the possible injustice of an isolated situation by arbitrarily weakening legislation thoughtfully crafted to address a serious problem of abuse in our nation’s nursing homes. While it was undoubtedly a compelling personal circumstance that propelled this legislation, the resulting bill would make for bad law. The problem could be better addressed by focusing on the true roots of the problem (e.g., a justice system that has not functioned as effectively as it should to ensure the consideration of extenuating circumstances in seeking justice for the accused). To use this blunt tool to correct an isolated injustice would be to create bad law – law that would weaken the protection for a whole group of particularly vulnerable citizens.

The ‘loosening’ of the system to allow loopholes in the screening for criminal background among applicants for employment in nursing facilities comes at a time when evidence indicates that, if anything, we should be moving toward more careful and stringent standards. Multiple studies over recent years have revealed that abuse in our nation’s nursing homes is a serious and widespread problem. Most recently, a study (for Congressman Waxman) released in July of this year by the Special Investigations Division of the Committee on Government Relations found that 5,283 nursing homes – about one out of every three U.S. nursing homes – were cited for an abuse

violation during a two year period ending January 2001. All of these violations were serious enough in nature to have at least the potential to cause harm to nursing home residents. Clearly, this is not a time to be scaling back protections.

As to the specific exception proposed, I certainly recognize that the intensity of emotion in a domestic dispute can give rise to behaviors and actions (even assault) that fall outside the realm of an individual's normal behavior. However, the mere fact that an individual, when immersed in a stressful and conflictual situation, has displayed a propensity for capacity for injurious violence, is cause for concern. Moreover, because of the typical working conditions faced by most employees of long-term care facilities (difficult work with individuals who may be challenging to manage, and may strike out themselves, and patient/resident workloads that are often unmanageable), such employees are immersed in a high stress environment daily. Considering what we already know about the frequency of abuse episodes in nursing homes, it seems extremely ill-advised to create an exception to hire those who have already demonstrated a capacity for violent and dangerous behavior under stress."

TLC 4 Long Term Care Opposed Bill Provisions and Recommended Additional Improvements in Employee Background Checks

TLC 4 Long Term Care wrote on behalf of nursing home residents and their families concerning HB 2748 in stating:

"Nursing home residents in the Commonwealth of Virginia are the most fragile and dependent in the entire nation. Our legislators, in their wisdom, have acknowledged this by barring certain individuals from employment in nursing homes, and in the previous legislative session, by increasing the number of barrier crimes provided by law. Among individuals prohibited from nursing home employment are those who have been convicted of felonies involving bodily woundings in the course of violent domestic assaults. As one police detective put it, 'these are crimes that, but for the wound being a little deeper or closer to the heart, would have been homicides.'

It is incomprehensible that one would attempt to carve out an exception for perpetrators of such extreme violence. These are individuals who have demonstrated a propensity to lash out violently against individuals for whom they are supposed to care. They are individuals who have been convicted beyond a reasonable doubt by our system of justice. Legislation that would threaten the lives of thousands of vulnerable citizens should not be based on the possibility that one individual may have been wrongfully convicted, or theoretically rehabilitated.

Not only is this proposal dangerous for residents, it jeopardizes the safety of the thousands of good, caring and hardworking nurses and nursing assistants and other employees who would be required to work side by side, often late at night, with convicted violent felons. Nursing home employees need and deserve a safe workplace. At a time when nursing homes are having great difficulty retaining the best workers, this proposal will make nursing home employment even less desirable.

What is terribly frightening to residents and their families is that the individual whose case has apparently prompted this proposed legislation was able to obtain and continue employment caring for vulnerable adults for 13 months! Either she illegally failed to disclose her criminal background, or the facility knowingly hired her, failed to promptly conduct, or disregarded the results of a criminal background check. Any of the above scenarios indicates that even the current protections are not sufficient to protect residents.

We therefore respectfully submit that additional improvements to the current criminal background checks system are necessary and should be enacted as soon as possible. Nationwide background checks are now readily and inexpensively obtainable. **They should be mandatory for all employees and contractors, based on fingerprinting, and their results obtained *prior to employment.***"

National Background Checks Would Increase the Workload of Law Enforcement and the Costs for Long-Term Care Facilities

Requiring a national background check through the FBI would increase law enforcement workload and costs for the long-term care

facilities. *Code of Virginia* § 19.2-392.02 requires a local or state law enforcement agency to take the fingerprints that will be submitted to the State Police Department for an FBI employee background check. Fourteen fingerprint images (ten fingerprints, two additional thumb prints, and two side views) are taken and each image must be of an acceptable quality in order to be sent to the FBI.

The processing fee for the national FBI fingerprint check is also more costly than the CCRE check for crimes committed in Virginia. The national FBI fee is \$37.00 as compared to a processing fee of \$15.00 for a CCRE check by applicant name and \$13.00 for a CCRE check by applicant fingerprint. The higher cost for the FBI check results from the \$24.00 processing fee the FBI charges the Department of State Police for each set of fingerprints.

As noted previously, nursing homes are allowed but are not required by statute to have national criminal records checks completed on employees. Of the four categories of care-giving facilities reviewed in this study – nursing homes, assisted living facilities, DMHMRSAS-licensed facilities, and child welfare agencies – only DMHMRSAS-licensed facilities are required to complete national fingerprint checks.

The American Health Care Association (AHCA) has worked with federal authorities for a number of years to develop a means for nursing homes to conduct national background checks of potential employees at no cost to the nursing homes. Legislation (“Criminal Background Check Act of 2000” and “Senior Care Safety Act of 2000”) that would have provided the groundwork for these checks was introduced in both Houses of Congress last year. Neither bill was passed. AHCA plans to advocate for the introduction of similar legislation this year.

IV. Policy Options

The following Policy Options are offered for consideration by the Joint Commission on Health Care. They do not represent the entire range of actions that the Joint Commission may wish to pursue with regard to providing an exception to the barrier crimes that are included in statute.

- Option I:** **Recommend to the Senate Committee on Education and Health that House Bill 2748 not be reported.**
- Option II:** **Recommend to the Senate Committee on Education and Health that House Bill 2748, as adopted by the House of Delegates during the 2001 General Assembly Session, be reported.**
- Option III:** **Introduce legislation to amend Section 32.1-126.01 of the *Code of Virginia* to specify three additional types of offenses as barrier crimes for nursing homes. Those crimes would be burglary, felony distribution of drugs, and felony possession of drugs.**
- Option IV:** **Include in the 2002 Workplan for the Joint Commission on Health Care further study and analysis of the barrier crimes that are defined in statute for assisted living facilities.**

APPENDIX A

SENATE OF VIRGINIA



WARREN E. BARRY
37TH SENATORIAL DISTRICT
PART OF FAIRFAX AND
PRINCE WILLIAM COUNTIES, AND
PART OF THE CITY OF FAIRFAX
POST OFFICE BOX 1146
FAIRFAX, VIRGINIA 22030-1146

COMMITTEE ASSIGNMENTS:
EDUCATION AND HEALTH, CHAIR
COMMERCE AND LABOR
FINANCE
TRANSPORTATION
RULES

April 4, 2001

The Honorable William T. Bolling, Chairman
Joint Commission on Health Care
1001 East Broad Street
Richmond, Virginia 23219

Dear Senator Bolling:

House Bill 2748 (Barlow), a bill relating to criminal records checks for nursing home employees, was considered by the Senate Committee on Education and Health during the 2001 Session of the General Assembly. This bill would have required the Department of Health to screen prospective applicants who have been convicted of a barrier crime relating to domestic violence to determine if the person has been successfully rehabilitated and is not a risk to nursing home residents. This bill was motivated by a case involving a woman who is reportedly a good caregiver but who cannot work in nursing homes because of a conviction relating to domestic violence. Testimony indicated that there are many people who fall in this category and that, in view of the nursing shortage, some consideration of the issues presented by HB 2748 might be helpful.

Therefore, when the motion to pass by HB 2748 was made, the Committee included a request for the Long-Term Care Subcommittee of the Joint Commission on Health Care to examine the provisions of HB 2748 (as introduced and as engrossed). Thus, on behalf of the members of the Senate Committee on Education and Health, I respectfully ask that the Joint Commission on Health Care include HB 2748 and its related issues in its 2001 study plan and that the Joint Commission inform the Senate Committee on Education and Health of its findings as soon as practicable.

Thank you for considering this request.

Sincerely,

A handwritten signature in black ink, appearing to read "Warren E. Barry".

Senator Warren E. Barry, Chairman
Senate Committee on Education and Health

cc: Members, Senate Committee on Education and Health
The Honorable William K. Barlow

Enclosures

APPENDIX B

2001 SESSION

014161620

HOUSE BILL NO. 2748

Offered January 19, 2001

A BILL to amend and reenact § 32.1-126.01 of the Code of Virginia, relating to nursing home employees and criminal records checks.

Patrons—Barlow and Baskerville

Referred to Committee on Health, Welfare and Institutions

Be it enacted by the General Assembly of Virginia:

1. That § 32.1-126.01 of the Code of Virginia is amended and reenacted as follows:

§ 32.1-126.01. Employment for compensation of persons convicted of certain offenses prohibited; criminal records check required; suspension or revocation of license.

A. A licensed nursing home shall not hire for compensated employment, persons who have been convicted of murder, abduction for immoral purposes as set out in § 18.2-48, assaults and bodily woundings as set out in Article 4 (§ 18.2-51 et seq.) of Chapter 4 of Title 18.2, robbery as set out in § 18.2-58, sexual assault as set out in Article 7 (§ 18.2-61 et seq.) of Chapter 4 of Title 18.2, arson as set out in Article 1 (§ 18.2-77 et seq.) of Chapter 5 of Title 18.2, pandering as set out in § 18.2-355, crimes against nature involving children as set out in § 18.2-361, taking indecent liberties with children as set out in § 18.2-370 or § 18.2-370.1, abuse and neglect of children as set out in § 18.2-371.1, failure to secure medical attention for an injured child as set out in § 18.2-314, obscenity offenses as set out in § 18.2-374.1 or § 18.2-379, or abuse or neglect of an incapacitated adult as set out in § 18.2-369. However, a licensed nursing home may hire an applicant who has been convicted of one misdemeanor specified in this section not involving abuse or neglect or moral turpitude, provided five years have elapsed following the conviction.

In addition, a licensed nursing home may hire an applicant who has been convicted of one felony relating to assaults and bodily woundings pursuant to Article 4 (§ 18.2-51 et seq.) of Chapter 4 of Title 18.2 if (i) the conviction related to a domestic dispute between the applicant and a family member or significant other person, (ii) the applicant provides the nursing home with copies of the court papers relating to the conviction, (iii) at least five years have elapsed since such conviction, (iv) the applicant has paid all court costs relating to the conviction and has been released from any probation, (v) the applicant has no additional misdemeanor or felony convictions for assault and bodily woundings or any other crimes specified in this section, and (vi) the applicant provides at least three references, including two references that attest to the applicant's character and disposition and at least one employer reference that attests to the applicant's character, disposition, and work performance.

Any person desiring to work at a licensed nursing home shall provide the hiring facility with a sworn statement or affirmation disclosing any criminal convictions or any pending criminal charges, whether within or without the Commonwealth. Any person making a materially false statement when providing such sworn statement or affirmation regarding any such offense shall be guilty upon conviction of a Class 1 misdemeanor. Further dissemination of the information provided pursuant to this section is prohibited other than to a federal or state authority or court as may be required to comply with an express requirement of law for such further dissemination.

A nursing home shall, within thirty days of employment, obtain for any compensated employees an original criminal record clearance with respect to convictions for offenses specified in this section or an original criminal history record from the Central Criminal Records Exchange. The provisions of this section shall be enforced by the Commissioner. If an applicant is denied employment because of convictions appearing on his criminal history record, the nursing home shall provide a copy of the information obtained from the Central Criminal Records Exchange to the applicant.

The provisions of this section shall not apply to volunteers who work with the permission or under the supervision of a person who has received a clearance pursuant to this section.

B. A person who complies in good faith with the provisions of this section shall not be liable for any civil damages for any act or omission in the performance of duties under this section unless the act or omission was the result of gross negligence or willful misconduct.

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54 C. A licensed nursing home shall notify and provide to all students a copy of the provisions of
 55 this section prior to or upon enrollment in a certified nurse aide program operated by such nursing
 56 home.

Official Use By Clerks			
Passed By The House of Delegates		Passed By The Senate	
with amendment	<input type="checkbox"/>	with amendment	<input type="checkbox"/>
substitute	<input type="checkbox"/>	substitute	<input type="checkbox"/>
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Date: _____		Date: _____	
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Clerk of the House of Delegates		Clerk of the Senate	

2001 SESSION

019838876

HOUSE BILL NO. 2748

FLOOR AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by Delegate Orrock
on February 4, 2001)

(Patron Prior to Substitute—Delegate Barlow)

A BILL to amend and reenact § 32.1-126.01 of the Code of Virginia, relating to nursing home employees and criminal records checks.

Be it enacted by the General Assembly of Virginia:

1. That § 32.1-126.01 of the Code of Virginia is amended and reenacted as follows:

§ 32.1-126.01. Employment for compensation of persons convicted of certain offenses prohibited; criminal records check required; suspension or revocation of license.

A. A licensed nursing home shall not hire for compensated employment, persons who have been convicted of murder, abduction for immoral purposes as set out in § 18.2-48, assaults and bodily woundings as set out in Article 4 (§ 18.2-51 et seq.) of Chapter 4 of Title 18.2, robbery as set out in § 18.2-58, sexual assault as set out in Article 7 (§ 18.2-61 et seq.) of Chapter 4 of Title 18.2, arson as set out in Article 1 (§ 18.2-77 et seq.) of Chapter 5 of Title 18.2, pandering as set out in § 18.2-355, crimes against nature involving children as set out in § 18.2-361, taking indecent liberties with children as set out in § 18.2-370 or § 18.2-370.1, abuse and neglect of children as set out in § 18.2-371.1, failure to secure medical attention for an injured child as set out in § 18.2-314, obscenity offenses as set out in § 18.2-374.1 or § 18.2-379, or abuse or neglect of an incapacitated adult as set out in § 18.2-369. However, a licensed nursing home may hire an applicant who has been convicted of one misdemeanor specified in this section not involving abuse or neglect or moral turpitude, provided five years have elapsed following the conviction.

Notwithstanding the above, a licensed nursing home may hire for compensated employment a person who has been convicted of not more than one felony relating to assaults and bodily woundings pursuant to Article 4 (§ 18.2-51 et seq.) of Chapter 4 of Title 18.2 related to a domestic dispute, if the Department determines, based upon a screening assessment, that such person has been successful rehabilitated and is not a risk to the residents of the nursing home based on his criminal history background.

The Department shall screen prospective applicants to assess whether such persons have been successfully rehabilitated and are not a risk to residents of the nursing home based on their criminal history backgrounds. The Department may contract for such screening services. To be eligible for such screening, the applicant must have completed all prison or jail terms; not be under probation or parole supervision, or any suspended sentence; have no pending charges in any locality, have paid all fines, restitution, and court costs for any prior convictions; and have been free of any suspended sentence, parole or probation for at least seven years for drug convictions and five years for all other convictions. In addition to any such additional information as the Department may require or the prospective applicant wishes to present, the prospective applicant shall provide to the state screening contractor a statement from his most recent probation or parole officer, if any, outlining his period of supervision, together with a copy of any pre-sentencing or post-sentencing report in connection with each felony conviction. The cost of such screening shall be paid by the prospective applicant, unless the licensed nursing home decides, at its option to pay such cost.

Any person desiring to work at a licensed nursing home shall provide the hiring facility with a sworn statement or affirmation disclosing any criminal convictions or any pending criminal charges, whether within or without the Commonwealth. Any person making a materially false statement when providing such sworn statement or affirmation regarding any such offense shall be guilty upon conviction of a Class 1 misdemeanor. Further dissemination of the information provided pursuant to this section is prohibited other than to a federal or state authority or court as may be required to comply with an express requirement of law for such further dissemination.

A nursing home shall, within thirty days of employment, obtain for any compensated employees an original criminal record clearance with respect to convictions for offenses specified in this section or an original criminal history record from the Central Criminal Records Exchange. The provisions of this section shall be enforced by the Commissioner. If an applicant is denied employment because of convictions appearing on his criminal history record, the nursing home shall provide a copy of the

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55 information obtained from the Central Criminal Records Exchange to the applicant.

56 The provisions of this section shall not apply to volunteers who work with the permission or under
57 the supervision of a person who has received a clearance pursuant to this section.

58 B. A person who complies in good faith with the provisions of this section shall not be liable for
59 any civil damages for any act or omission in the performance of duties under this section unless the
60 act or omission was the result of gross negligence or willful misconduct.

61 C. A licensed nursing home shall notify and provide to all students a copy of the provisions of
62 this section prior to or upon enrollment in a certified nurse aide program operated by such nursing
63 home.

Official Use By Clerks			
Passed By		Passed By The Senate	
The House of Delegates		with amendment	
with amendment	<input type="checkbox"/>	with amendment	<input type="checkbox"/>
substitute	<input type="checkbox"/>	substitute	<input type="checkbox"/>
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Date: _____		Date: _____	
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Clerk of the House of Delegates		Clerk of the Senate	

APPENDIX C



JOINT COMMISSION ON HEALTH CARE

SUMMARY OF PUBLIC COMMENTS: Employment Exceptions for Nursing Facility Employees

Organizations/Individuals Submitting Comments

Eight organizations submitted comments in response to employment exceptions for nursing facility employees:

- AARP
- Alzheimer's Association
- District Three Governmental Cooperative
- Jefferson Area Board for Aging
- Virginia Association of Nonprofit Homes for the Aging
- Virginia Health Care Association
- Virginia Long-Term Care Ombudsman Program
- TLC 4 Long Term Care

Policy Options Included in the Employment Exceptions Issue Brief

- Option I:** Recommend to the Senate Committee on Education and Health that House Bill 2748 not be reported.
- Option II:** Recommend to the Senate Committee on Education and Health that House Bill 2748, as adopted by the House of Delegates during the 2001 General Assembly Session, be reported.

Option III: Introduce legislation to amend Section 32.1-126.01 of the *Code of Virginia* to specify three additional types of offenses as barrier crimes for nursing homes. Those crimes would be burglary, felony distribution of drugs, and felony possession of drugs.

Option IV: Include in the 2002 Workplan for the Joint Commission on Health Care further study and analysis of the barrier crimes that are defined in statute for assisted living facilities.

Overall Summary of Comments

The following table summarizes the comments that were received on each Policy Option. As shown, Option I was supported by the largest number of commenters (seven) followed by five favorable comments for Option IV and three favorable comments for Option III. Option II was opposed by six commenters, Option III by two commenters, and Option IV by one commenter.

Policy Option	Number of Comments in Support	Number of Comments in Opposition
I	7	0
II	0	6
III	3	2
IV	5*	1

*VHCA commented in support of offering legislation to conform the barrier crimes for assisted living facilities with the barrier crimes for nursing facilities as opposed to further study of the barrier crimes as suggested in Option IV.

Summary of Individual Comments

AARP

Jack R. Hundley, Chairman, Virginia State Legislative Committee, commented in support of Options I and IV and in opposition to Options II

and III. Mr. Hundley stated, "Whereas AARP is sympathetic to the individual situation that was the basis for introduction of HB 2748, it is also cognizant of the greater potential risks to nursing home residents if this bill is passed. Any changes to Virginia's current statutes should be carefully thought-out before any enactment. Additionally if HR 2677 should pass Congress and become a mandate on the states or even provide guidelines to the states desiring to make changes in their statutes, the availability of that information would be helpful to states in their decision-making."

Alzheimer's Association

Ian N. Kremer, Director, Public Policy, commented in favor of Option I and in opposition to Options II, III, and IV. Mr. Kremer stated, "While sympathetic to the circumstances which led to introduction of HB 2748 the Alzheimer's Association continues to oppose relaxation of the barrier crimes law." In addition, Mr. Kremer indicated that passage of HB 2748 would undermine nursing home safety, confidence in quality, "public and private efforts to address nurse workforce issues...[and] the Commonwealth's clear momentum toward strengthening its barrier crimes statute."

District Three Governmental Cooperative

Mike Guy, Executive Director, commented in support of Option I and to oppose Option II. Mr. Guy stated, "We do not support exceptions to the guidelines that would make it easier for convicted felons to become care providers in nursing homes."

Jefferson Area Board for Aging

Gordon Walker, CEO, commented in support of Options I, III, and IV and in opposition to Option II. With regard to Option III, Mr. Walker wrote, "JABA supports this option, with the condition that there be further study of the impact of such legislation. In particular, it would be helpful to know if individuals with these types of felony charges have been in the past, or are currently employed in nursing homes. If so, have there been instances of recurrent behavior that puts nursing home residents and/or staff at risk. The resident population in nursing homes is highly vulnerable, physically and psychosocially. If there have been problems

with resident care because individuals with histories of burglary, felony distribution of drugs, and felony possession of drugs, this may be the time to ensure that risk is removed for the nursing home environment.”

Virginia Association of Nonprofit Homes for the Aging

Marcia Tetterton, Vice President of Public Policy commented in support of Options I and IV.

Virginia Health Care Association

Mary Lynne Bailey, Vice President, Legal and Government Affairs, commented with regard to Option IV. Ms. Bailey stated, “We would strongly recommend the Joint Commission offer legislation to conform assisted living, hospice, and home health care barrier crimes statutes to the nursing facility barrier crimes statute. We do not believe any further study by the Joint Commission is needed before offering these legislative amendments.”

Ms. Bailey did not take a position on Options I and II noting that “VHCA members believe that the barrier crimes statute is a valuable tool in screening potential employees to ensure a safe environment for nursing and assisted living facility residents. While the majority of our members did not support the development of an appeal mechanism for people convicted of barrier crimes, some members have had experiences with employees and potential employees who have had unfortunate, and sometimes unfair, results from court proceedings.”

With regard to Option III, Ms. Bailey indicated that the current list of barrier crimes is the result of years of consideration and refinement by the General Assembly. Ms. Bailey stated that the barrier crimes that were originally enacted in 1992 included drug and property crimes that may have been inappropriate. Consequently “in 1993, legislators, patient advocates, and provider representatives got together to work out more realistic barrier crimes statutes. Since the reason for barrier crimes statutes was protection of patients, we removed drug possession crimes, bad checks and other property crimes in which there was no threat to the safety of any person. We retained all crimes that would give any cause for concern that patient safety might be compromised, including all sexual, pornographic, arson, robbery, assault, etc. crimes. The balance reflected in the resulting statutes has worked very well since 1993. VHCA

recommends that any additional changes to the statute be very carefully weighed.”

Virginia Long-Term Care Ombudsman Program

Joani Latimer, State Long-Term Care Ombudsman, commented in support of Options I, III, and IV and in opposition to Option II. Ms. Latimer stated, “we fully support Policy Option III, to introduce legislation to amend the Code of Virginia to specify three additional types of offenses as barrier crimes – burglary, felony distribution of drugs, and felony possession of drugs. Complaints received by the Ombudsman Program and other data, both statewide and national in scope, attest to the fact that we have significant problems in our long-term care facilities with both theft of personal property, as well as with incidents of drug diversion. It is therefore difficult to fathom that these offenses have not, to date, been among those that would bar an applicant from employment....Finally we recommend that Policy Option III be acted upon in conjunction with the activation of Policy Option IV, which would include, in the 2002 workplan for the Joint Commission on Health Care, further study and analysis of the barrier crimes that are defined in statute for assisted living facilities. The Joint Commission staff report is extremely valuable in profiling a serious and somewhat mystifying problem with current statute defining barrier crimes for long-term care facilities.”

TLC4 Long Term Care

Ilene Henshaw commented in support of Options I and III. Ms. Henshaw further stated that “a comprehensive analysis of barrier crime legislation as it pertains to all caregivers who work with vulnerable populations should be undertaken. We suggest that this analysis should have, as a goal, uniformity in the requirements for criminal background checks and barrier crime legislation for all elder care, child care and mental health and other health care workers. Following this analysis, we urge the creation of a central registry for such caregivers against which is a prospective employees’ name can be checked prior to employment.

As discussed in the staff report, the individual whose case prompted this proposal was able to obtain and continue her employment for 13 months, despite the requirement that she disclose to her employer her criminal background. In light of the recent alarming statistics that about one of every three US nursing homes was cited for serious abuse violations

in the past two years, we strongly urge that the 2002 Workplan include a **study of the effectiveness of the Commonwealth's current criminal background check/barrier crime system.**"

JOINT COMMISSION ON HEALTH CARE

Executive Director

Patrick W. Finnerty

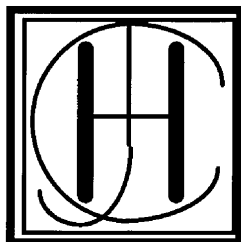
Senior Health Policy Analysts

Joseph J. Hilbert
E. Kim Snead

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