Virginia State Crime Commission

2006 Annual Report

COMMONWEALTH of VIRGINIA

Virginia State Crime Commission

Senator Kenneth W. Stolle, *Chairman*
Delegate David B. Albo, *Vice Chairman*

Executive Director
James O. Towey

Director of Legal Affairs
G. Stewart Petoe

General Assembly Building, Suite 915
910 Capitol Street
Richmond, Virginia 23219

804-225-4534
Fax: 804-786-7872

May 22, 2007

TO: The Honorable Timothy M. Kaine, Governor of Virginia
Members of the Virginia General Assembly

Pursuant to the provisions of the Code of Virginia §§ 30-156 through 30-164 creating the Virginia State Crime Commission and setting forth its purpose, I have the honor of submitting herewith the year end 2006 Annual Report.

Sincerely,

Kenneth W. Stolle
Chairman

AUTHORITY OF THE COMMISSION

Established in 1966, the Virginia State Crime Commission ("Commission") is a legislative agency authorized by *Code of Virginia* § 30-156 *et seq.* to study, report, and make recommendations on all areas of public safety and protection. In doing so, the Commission endeavors to ascertain the causes of crime and ways to reduce and prevent it, to explore and recommend methods of rehabilitation for convicted criminals, to study compensation of persons in law enforcement and related fields and examine other related matters including apprehension, trial, and punishment of criminal offenders. The Commission makes such recommendations as it deems appropriate with respect to the foregoing matters, and coordinates the proposals and recommendations of all commissions and agencies as to legislation affecting crimes, crime control and public safety. The Commission cooperates with the executive branch of state government, the Attorney General's office and the judiciary who are in turn encouraged to cooperate with the Commission. The Commission cooperates with governments and governmental agencies of other states and the United States. The Commission is a criminal justice agency as defined in *Code of Virginia* § 9.1-101.

The Commission consists of thirteen members that include nine legislative members, three non-legislative citizen members, and one state official as follows: six members of the House of Delegates to be appointed by the Speaker of the House of Delegates in accordance with the principles of proportional representation contained in the Rules of the House of Delegates; three members of the Senate to be appointed by the Senate Committee on Rules; three non-legislative citizen members to be appointed by the Governor; and the Attorney General or his designee.

MEMBERS

Chairman

Senator Kenneth W. Stolle

Vice-Chairman

Delegate David B. Albo

Senate Appointments

Senator Janet D. Howell

Senator Thomas K. Norment, Jr.

House of Delegate Appointments

Delegate Robert B. Bell

Delegate Terry G. Kilgore

Delegate Kenneth R. Melvin

Delegate Brian J. Moran

Delegate Beverly J. Sherwood

Attorney General

The Honorable Robert F. McDonnell

Governor's Appointments

Mr. Glenn R. Croshaw

Colonel W. Gerald Massengill

The Honorable Richard E. Trodden

STAFF

Judge Alan E. Rosenblatt, Interim Executive Director

G. Stewart Petoe, Director of Legal Affairs

Kristen J. Howard, Deputy Director

Christina Barnes, Policy Analyst

Stephen W. Bowman, Staff Attorney/Sr. Policy Analyst

Thomas E. Cleator, Staff Attorney

Lauren Ernst, Policy Analyst

Steven D. Benjamin, Special Counsel

VIRGINIA STATE CRIME COMMISSION

General Assembly Building
910 Capitol Street, Suite 915
Richmond, Virginia 23219
804.225.4534
804.786.7872 Fax

Table of Contents

Mandated Studies

Animal Control Officers

House Joint Resolution 116, introduced by Delegate Terry G. Kilgore and passed during the 2006 Virginia General Assembly Session, directed the Commission to study the need for regulation, training, and funding of animal control officers and also their duties, responsibilities and budgets.

The Code of Virginia, §3.1-796.104, states that each county or city shall appoint an officer to be known as the animal control officer who shall have the power to enforce all ordinances enacted pursuant to this chapter and all laws for the protection of domestic animals. Staff conducted a comprehensive analysis of animal control responsibilities and duties, as well as, a review of training requirements and curriculum. Currently, the State veterinarian is charged with the establishment of training criteria, as well as, the maintenance of records regarding training compliance.

In 2006, based on recommendations from the National Animal Control Association, minimum training standards for the basic animal control officer course were expanded from 40 hours to 84 hours. Animal control officer training includes courses in animal related law, basic law enforcement, public safety and recognition of child abuse and neglect. Animal control officers are required to complete basic training within the first two years of appointment and to fulfill additional animal control and protection training courses every three years.

Staff created and distributed a brief questionnaire to each locality's City and County Administrator across the Commonwealth directly addressing the study mandates. The survey was designed to gather information regarding the number of animal control officers employed by each locality, routine responsibilities, specific budget and funding sources, oversight department and various training issues. Seventy-eight percent (104 of 134) of localities responded to the survey, representing a total of 361 animal control officers. Sixty percent of localities employ one or two certified animal control officers and/or deputies. Ninety-three percent of animal control officers regularly perform animal control duties and, of those, 34 percent are certified law enforcement officers.

Funding for animal control officers is determined by each locality and varies greatly. The survey indicated that the amount spent per locality on animal control ranged from a low of $2,000 to a high of $2.5 million.

Seventy six percent of localities reported that their training was adequate, however, 53 percent reported that not enough training opportunities exist. Survey results indicate that both the adequacy of training and the availability of regional training opportunities were concerns for the majority of localities. In response to those needs, staff convened a workgroup to discuss the issues cited in the survey and to develop recommendations for improving animal control issues in the Commonwealth. The agencies that participated included:

Department of Criminal Justice Services;
Department of Game and Inland Fisheries;
Humane Society;
Office of the State Veterinarian; and,
Virginia Animal Control Association;

The workgroup developed two recommendations that were unanimously approved by the Crime Commission. The first recommendation involved the creation of a Memorandum of Understanding between the agency heads of the participating agencies (with the exception of the Humane Society) to facilitate agency awareness, collaboration and cooperation regarding animal control officer issues.

The second recommendation was to create a standing Committee to address animal control officer issues. The Committee will meet four times a year, preferably once each quarter and report to the Crime Commission annually. The workgroup identified agency participants as:

Department of Criminal Justice Services;
Department of Game and Inland Fisheries;
Humane Society;
Office of Risk Management;
Office of the State Veterinarian;
Virginia Animal Control Association;

Virginia Association of Chiefs of Police;
Virginia Association of Counties;
Virginia Municipal League; and,
Virginia Sheriff's Association.

The Commission would like to acknowledge the following for their assistance in this study:

Kevin Kilgore, Virginia Animal Control Association

Kathy Strouse, Virginia Animal Control Association

George Gotschalk, Department of Criminal Justice Services

Dr. Marilyn Haskell, Virginia Department of Agriculture and Consumer Services

Colleen Calderwood, Virginia Department of Agriculture and Consumer Services

Col. Mike Bise, Department of Game and Inland Fisheries

Kim Miller, Virginia Animal Control Association

Seventy six percent of localities reported that their training for Animal Control Officers was adequate, however, 53 percent reported that not enough training opportunities exist.

Driving Under the Influence

House Joint Resolution 35, introduced by Delegate David B. Albo and passed during the 2006 Virginia General Assembly Session, directed the Commission to study the effectiveness of existing punishments and to recommend additional remedies for driving under the influence (DUI).

Specifically, the resolution directs the Commission to study the effectiveness of existing punishments by comparing current DUI rates to past DUI rates, by determining the degree to which offenders suffer multiple convictions, and by using any other appropriate punishment effectiveness measurement adopted by the Commission. Additional remedies for the offense of driving while intoxicated will be recommended, if appropriate.

In 2004, the General Assembly enacted significant changes to Virginia's DUI statutes by increasing the penalty for driving under the influence, lowering the blood alcohol level (BAC) for which mandatory sentences are imposed, and adopting other measures to punish drinking and driving. First, the General Assembly increased the amount of mandatory minimum time that was to be imposed for a conviction of a second or third DUI offense. (Mandatory minimum time is time that must be imposed by a judge, and cannot be suspended). A second DUI offense in five years now results in a mandatory minimum sentence of twenty days, instead of the previous five days; a third offense in ten years now results in a mandatory minimum sentence of ninety days, instead of the previous ten days; and the mandatory minimum sentence for a third offense in five years is now six months, instead of the previous thirty days.

Second, the General Assembly lowered the blood alcohol level at which additional mandatory minimum sentences are imposed. Previously, these additional punishments were triggered when the defendant had a BAC of .20 or higher. As a result of the 2004 enactments, they are now required whenever a defendant's BAC is .15 or higher.

Finally, additional measures were enacted to increase the punishment that repeat offenders could

receive. The changes to the law allow the Commonwealth to seize a defendant's car in a forfeiture proceeding for a third DUI offense occurring within ten years. Immediately after an arrest for a DUI, a defendant's driver's license is administratively suspended for seven days; this time period was increased to sixty days if the defendant is arrested for a second offense, and until the time of trial for a third offense. A presumption against bail was created for all defendants arrested for a third DUI within five years. And, if a person is driving on a restricted license due to a previous DUI conviction, a BAC of .02 will result in a new criminal offense.

These penalty increases and enhancements went into effect on July 1, 2004. In order to ascertain what impact they have had on the recidivism rates for DUI offenders, the number of convictions for first, second, and third DUI offenses were compared from 2002 through to 2005 (the last year for which complete numbers are available). In addition, information was obtained from the Virginia Alcohol Safety Action Program regarding the various treatment programs offered to DUI offenders.

The data shows that there were fewer convictions for second and third offense drunk driving charges in 2005, as compared to 2004. Because this data reveals recidivism rates for only a one year period, it is possible that other factors are responsible for the lower numbers. Staff has concluded that it is not possible to definitively state, with methodological rigor, that the more severe punishments are causing recidivism for drunk driving to decline. Whether the lower numbers for DUI convictions will continue, or whether 2005 will come to be seen as an unusual year in which the number of DUI incidents was lower than normal, remains to be determined.

Additionally, there are many factors that contribute to the total number of DUI incidents occurring during a given year. The number of law enforcement officers assigned to patrol for drunk drivers, the number of DUI checkpoints established throughout the state, and the number of public service announcements on radio and television cautioning people to avoid drunk driving, all may impact DUI rates. The types of counseling and treatment given to people convicted of a first DUI may have even more of an impact on their future behavior than the amount of punishment they receive. Attempting to objectively discern what precise variables are having the most measurable effects on lowering DUI rates is extremely difficult.

While the initial data for the past year, with the lower DUI figures, is encouraging, it is too soon to draw any firm conclusions as to whether this is due to the changes made to the DUI statutes in 2004. Until data is available for at least four to six years, it is not possible to assess whether those changes are responsible for lowering recidivism rates. Nevertheless, the initial data is promising, and the Crime Commission intends to continue monitoring DUI rates on an annual basis to see if the downward trend continues.

The Commission would like to acknowledge the following for their help in this study:

Dr. James Reinhardt, Department of Mental Health, Mental Retardation and Substance Abuse Services

Steven Wolf, Department of Mental Health, Mental Retardation and Substance Abuse Services

The data shows that there were fewer convictions for second and third offense drunk driving charges in 2005, as compared to 2004. Whether the lower numbers for DUI convictions will continue, or whether 2005 will come to be seen as an unusual year in which the number of DUI incidents was lower than normal, remains to be determined.

Juvenile Justice

House Joint Resolution 136, introduced by Delegate Brian J. Moran and passed during the 2006 Virginia General Assembly Session, directed the Commission to study the Virginia Juvenile Justice System over a two year period. Specifically, the Commission is to examine recidivism, disproportionate minority contact with the justice system, improving the quality of and access to legal counsel based on American Bar Association recommendations, accountability in the courts, and diversion. The Commission is also to analyze Title 16.1 of the Code of Virginia to determine the adequacy and effectiveness of Virginia's statutes and procedures relating to juvenile delinquency.

In the first year of the study, Commission staff collected national and state literature and data regarding an overview of juvenile justice issues, obtained background research materials and preliminary statistics, and met with professionals in the juvenile justice field. Sources reviewed include the U.S. Department of Justice Office of Justice Programs, Office of Juvenile Justice and Delinquency, Bureau of Justice Statistics, National Council of Juvenile and Family Court Judges, Juvenile Justice Evaluation Center, Virginia Department of Juvenile Justice, Virginia Department of Criminal Justice Services and the American Bar Association. Staff members attended a seminar sponsored by Department of Criminal Justice Services to ascertain current information on disproportionate minority contact in the Juvenile Justice System and also attended the 30th Fall Juvenile Justice Institute sponsored by Virginia Juvenile Justice Association. Additionally, Commission members were briefed on some of the issues raised in the resolution by Virginia's Department of Juvenile Justice and Virginia's Criminal Sentencing Commission.

A review of both the Virginia's Advisory Committee on Juvenile Justice (VACJJ) and the American Bar Association (ABA) juvenile justice reports was also completed. Based on the VACJJ's 2004 annual report, the Commonwealth's juvenile justice system faces a challenge regarding disproportionate minority contact. According to VACJJ, although only 23% of the juvenile population are minorities, minority offenders comprise 38% of intake offenders, 45% of intake and technical and delinquent offenders, 50% of secure detention admissions, and 66% of commitments to juvenile correctional centers. Additionally in 2002, the ABA and the Mid-Atlantic Defender Center asserted that there was a need for quality legal representation in delinquency proceedings. This was related to the timing of appointment of counsel, uninformed waiver of counsel, lack of public defender offices in some localities, untrained and inexperienced counsel, lack of ancillary resources, and the perception that juvenile court was viewed as a "kiddy court."

States across the nation are experimenting with new policies and efforts to minimalize juvenile crime and detention. In Virginia, localities address juvenile justice in different ways, some potentially more effective than others. Next year, staff plans to complete an analysis of the extent of disproportionate minority contact. If the analysis reveals that there is a systemic failure, recommendations will be made to address the issue.

Staff will consult with the Virginia Indigent Defense Commission (VIDC) regarding Virginia's certification procedures for court appointed attorneys and the number of attorneys currently certified to handle such cases. Staff will also consult with the Virginia Supreme Court and the VIDC to determine the rate of compensation paid to court appointed attorneys who represent juveniles and the cost of indigent defense to the Commonwealth. A series of questions will be developed in order to obtain information about the compensation paid to court appointed counsel in the neighboring states of Tennessee, North Carolina, Kentucky, West Virginia, and Maryland. Results will be evaluated and compared to the compensation paid in Virginia.

The Commission plans to create a work group of Juvenile and Domestic Relations district court (JDR) judges, who will be selected based on regional considerations. Approximately eight JDR judges will be asked to participate in the creation of a statewide JDR judicial survey instrument and to discuss juvenile access to counsel and quality of representation in Virginia's juvenile justice proceedings. The availability and effectiveness of current diversion opportunities available to juveniles will also be reviewed and discussed and, if needed, recommendations for additional or alternative remedies will be made. Included in the survey will be questions

regarding disproportionate minority contact, analysis of Virginia's statutes and overall perceptions of Virginia's juvenile justice system. Results will be analyzed by region, population, and juvenile crime rate. Both the work group and survey results will provide information as to the adequacy and efficiency of the juvenile justice system, as well as strategies and programs designed to improve the functioning of the juvenile justice system.

Also during year two of the study, staff will conduct a comprehensive analysis of Title 16.1 to determine the adequacy and effectiveness of Virginia's statutes and procedures relating to juvenile delinquency.

Since 2000, very few inmates have been released by Virginia Department of Corrections (DOC) on geriatric parole, none of which were convicted sex offenders. The issue of sex offenders being released on geriatric parole does not appear to be a problem at this time.

Sex Offenders in Nursing Homes

Senate Joint Resolution 120, introduced by Senator Kenneth W. Stolle and passed during the 2006 Virginia General Assembly Session, directed the Commission to study the monitoring of sex offenders in nursing homes and assisted living facilities. Specifically, the study was to examine:

- Avenues to better protect residents from sex offenders;
- Current procedures to protect residents from other residents who may commit sex offenses due to debilitating physical and mental self-control as a result of stroke and other illnesses;
- The number of prisoners being released on geriatric parole;
- The number of registered sex offenders housed in nursing homes and assisted living facilities in Virginia;
- Notification and monitoring of sex offenders in Virginia's nursing homes and assisted living facilities; and,
- Treatment options available to sex offenders housed in nursing homes and assisted living facilities in Virginia.

A report by the U.S. Government Accountability Office issued in March of 2006 examined the subject of residents of long-term care facilities who are registered sex offenders. This report stated that in Virginia, in January of 2005, there were seven registered sex offenders living in nursing homes and two living in ICF-MR facilities (Intermediate Care Facility for the Mentally Retarded).

Staff independently examined this issue, obtaining from the Virginia Department of Health and the Virginia Department of Social Services lists of all registered nursing homes and assisted living facilities in the state. With the assistance of the Virginia State Police, 861 addresses were checked against the Virginia Sex Offender Registry. The State Police determined in this analysis that as of December 2006, there were only three registered sex offenders who could be verified as living in nursing homes, and 16 who could be verified as living in assisted living facilities. It must be noted that the definition of an assisted living facility is slightly different, and broader, than that of an ICF-MR facility, which was the type of residential facility examined in the federal study. The State

Police also identified an additional 13 registered sex offenders who could not be ruled out as living in a nursing home because the physical address of the nursing home was unclear and the sex offender was living in the same zip code as the facility. Staff concluded that it is extremely unlikely that in all 13 cases, the sex offender was actually living in the nursing home that was in the same postal area. Nevertheless, even with this over-inclusive assumption, the study revealed a maximum of 16 registered sex offenders living in nursing homes (the real number is probably somewhere between four and nine), and 13 offenders living in assisted living facilities. The most significant finding from staff research is that there are very few registered sex offenders in either nursing homes or assisted living facilities.

Since 2000, very few inmates have been released by Virginia Department of Corrections (DOC) on geriatric parole. Based on data obtained from DOC in 2006, two inmates were released on geriatric parole and neither of these persons were convicted of sex offenses. Additionally, based on DOC data for the previous four years, only three inmates were released on geriatric parole and none of these individuals were convicted of sex offenses. The issue of sex offenders being released on geriatric parole does not appear to be a problem at this time.

A subcommittee of the Commission was created and convened in November 2006 to address the issues raised in the resolution and to review the staff findings. Delegate Robert B. Bell was appointed chairman of the Sub-Committee that included representatives from the Virginia State Police, Virginia State Parole Board, Virginia Department of Health, Virginia Department of Mental Health, Virginia Department of Social Services, Office of the State Long-Term Care Ombudsman, Virginia Health Care Association, Virginia Hospital and Health Care Association, and the Virginia Association of Nonprofit Homes for the Aging.

Safety and treatment issues were addressed at the sub-committee meeting. Treatment options available for sex offenders residing in nursing homes and assisted living facilities were found to depend upon the resources of each individual facility. If the patient has a diagnosed psychological condition that requires treatment or counseling, the facilities attempt to provide that treatment. Resident safety at nursing homes and assisted living facilities is determined by both state regulations and individual facility policies. During the meeting, industry representatives indicated that all facilities attempt to monitor residents who are known to have violent or aggressive tendencies. Currently, nursing homes, but not assisted living facilities, are part of the list of entities that can request automatic updates from the Virginia State Police, concerning the sex offender registry. Nothing in the current registration law excuses a sex offender from complying with his registry obligations because he has moved into a nursing home or assisted living facility.

The subcommittee also addressed issues cited in House Bill 415, referred to the Crime Commission for review during the 2006 legislative session, that required notification of residents or guardians when there are sex offenders living in a facility.

Many participants expressed concern that requiring such notification could cause unnecessary alarm, but because of the Health Insurance Portability and Accountability Act (HIPAA), the facility could not disclose that information. It was decided to follow the same procedure that has been implemented for residential real estate contracts by which buyers are advised of the existence of the sex offender registry.

Based on this information and further discussion, the subcommittee suggested and the full Commission adopted the following legislative recommendations:

- Before a nursing home or assisted living facility admits a person for a period of time that is anticipated to be longer than three days, it should be required to check the patient's name on the State Police website to determine if he or she is a registered sex offender.
- Assisted living facilities should be added to the list of entities that can request automatic updates from the State Police regarding sex offenders.
- Nursing homes and assisted living facilities should be required to sign up for automatic notification from the State Police.
- Nursing homes and assisted living facilities should provide general notice to residents, when they are admitted, about the sex offender registry and the State

Police website.

Finally, during the course of this study, evidence of a related problem involving nursing homes became apparent. Based on information presented to the sub-committee, there are a growing number of cases in which residents of nursing homes who suffer from dementia and other cognitive impairments assault or attack other residents. Although this is an issue that needs to be studied, it is primarily a public health care issue. Therefore, the Commission has notified the Department of Mental Health, Mental Retardation and Substance Abuse Services and the Joint Commission on Health Care of the Commission's findings.

The Commission would like to acknowledge the following for their help in this study:

Mary Lynn Bailey, Virginia Health Care Association

Carrie Eddy, Virginia Department of Health

Joani Latimer, Office of the State Long-Term Care Ombudsman

Matthew Leighty, Virginia Hospital and Healthcare Association

Bob Kemmler, Virginia State Police

Beverly Morgan, Virginia Department of Mental Health, Mental Retardation and Substance Abuse Services

Dana Steager, Virginia Association of Nonprofit Homes for the Aging

Carolynne Stevens, Virginia Department of Social Services

Jackie Stump, Virginia Parole Board

Steven Wolf, Virginia Department of Mental Health, Mental Retardation and Substance Abuse Services

Sex Offender Rehabilitation Treatment

House Joint Resolution 115, introduced by Delegate Terry G. Kilgore and passed during the 2006 Virginia General Assembly Session, directed the Commission to study and report on the need for additional institutional programming for sex offenders at the Department of Corrections (DOC). The Commission was to examine the number of sex offenders housed at each correctional facility, the current availability of instructional staff at each facility, the required additional staff and accompanying costs for expanding the Sex Offender Rehabilitation and Treatment (SORT) program, and the recidivism rate for sex offenders who have participated in the SORT program before their release from DOC.

Studies have shown that convicted sex offenders tend to recidivate at high rates after their release from prison. Based on research that suggests that specialized sex offender treatment can reduce these rates of recidivism, thereby improving public safety, the Virginia DOC initiated a model treatment program for sex offenders. DOC also developed a program for training staff to implement this treatment model. Mental health practitioners who completed a minimum set of instruction and a minimum number of treatment hours were certified as Sex Offender Treatment Providers.

The Department of Corrections' sex offender treatment program consists of four parts. First, inmates participate in a psycho educational program, referred to as the Sex Offender Awareness Program, that is designed to educate inmates with histories of sexual aggression to the impact of their abuse on others and why sexual aggression is harmful. The second part is the Sex Offender Treatment Group that is a more intensive program where therapy sessions are conducted in a group setting. The third part is the Sex Offender Residential Treatment (SORT) program. SORT provides comprehensive and intensive sex offender treatment to selected DOC inmates who are at higher risk for sexual recidivism and who are within approximately three years of release. Part four is the Sex Offender Community Containment that is designed to assist and supervise inmates upon their release from prison.

The SORT program is conducted only at the

Brunswick Correctional Center and has been in operation for about five years. Current staff includes six clinicians who counsel a maximum capacity of 78 inmates, for a total cost of $520,270. If the SORT program were to be expanded, the addition of one clinician and an additional thirteen inmates (ratio of counselors to inmates is 1:13) would cost $86,712. Institutional costs (food, security, etc.) should remain a constant figure, however, DOC is not able to estimate associated capital costs specifically for the expansion of the SORT program.

Since DOC developed its treatment model there has been a reduction in funding for the program. As a result, the number of trained personnel available to deliver treatment services to sex offenders has been reduced and sex offender services in some institutions have been curtailed or eliminated.

Today, approximately 9,000 of the 29,435 inmates housed by Virginia DOC are sex offenders. Of these, about 7% are eligible for the SORT program. At this time, the DOC Office of Research and Evaluation is conducting an evaluation to review the overall effectiveness of the SORT program, and the data is not yet available. Because of the small number of inmates who have participated in the program and the short period of time that has elapsed since their release (48 months) it is premature to reach conclusions regarding recidivism rates and the effectiveness of the SORT program.

Referred Studies

Capital Murder

During the 2006 Session of the Virginia General Assembly, there were three bills introduced in the House of Delegates to expand Virginia's capital murder statute: House Bill 782 (eliminating the "triggerman rule"), House Bill 1018 (killing a judge), and HB 1311 (killing a witness). All three bills passed the House of Delegates and then were continued in the Senate Courts of Justice Committee. The Senate Courts of Justice Committee referred, by letter, all three bills to the Commission for study. The Commission reviewed U.S. Supreme Court cases and other states' capital murder statutes to examine the issues related to these three bills.

Over half of the states with capital murder statutes make the killing of a judge or a witness punishable by capital murder. There is no constitutional prohibition on making these homicides eligible for the death penalty.

Generally, the "triggerman rule" prohibits an individual, who was involved in a capital murder but was not the actual killer, from being charged with capital murder. Instead, that individual can only be charged with first degree murder, which does not carry the death penalty. The vast majority of states that have capital murder statutes do not have a "triggerman" rule. All of these states follow U.S. Supreme Court guidelines which permit the death penalty for a person who assisted, helped, or encouraged the actual killer, provided the accomplice had same intent or criminal culpability as the actual killer.

The Commission voted to amend Virginia's capital murder statue to make the killing of a judge and the killing of a witness capital crimes. The Commission also voted to amend the "triggerman" rule to allow a principal in the second degree (an accomplice who is present at the scene of the murder) to be charged with capital murder, if the person shares the same intent to kill as the actual killer. Under this recommendation, an accessory before the fact (an accomplice who is not actually present at the scene of the murder) could be charged with capital murder, if he ordered or directed the killing beforehand.

Castration of Sexually Violent Predators

Senator Hanger introduced Senate Bill 679 during the 2006 Session of the General Assembly to create a voluntary program that would allow prisoners considered to be a "sexually violent predator" to choose physical castration in lieu of involuntary commitment to a state mental facility. This bill was continued in the Senate Health and Education Committee and referred, by letter, to the Commission for further study.

Castration of sexually violent offenders can be achieved by physical means, such as surgically removing the testicles or ovaries, or chemically, by administering hormones or other drugs to lower testosterone levels. Currently, there are nine states (California, Florida, Georgia, Iowa, Louisiana, Montana, Oregon, Texas, and Wisconsin) that have castration programs - physical, chemical, or a combination of both. There are a few potential constitutional issues with castration, such as violations of the 8th Amendment ban on "cruel and unusual" punishment, violation of equal protection requirements, and violation of "due process" requirements. In addition to these legal issues, there are very few comprehensive, controlled studies that address the effectiveness of castration, especially those that focus on recidivism.

The Commission declined to make any recommendations concerning a voluntary castration program without any further data on recidivism rates.

In 2000, the federal "Victims of Trafficking and Violence Protection Act of 2000" was passed to address human trafficking. The purpose of the act was to increase the number of trafficking prosecutions, expand the number of crimes, and enhance penalties.

Human Trafficking

Several bills were introduced in the House of Delegates during the 2006 General Assembly session to create a new article in the Virginia Code, criminalizing human trafficking: House Bill 418 (Bulova), House Bill 965 (Ebbin), House Bill 1100 (Griffith), and House Bill 1152 (Lingamfelter). These bills were continued in the House Courts of Justice Committee because there was a concern that many of these new crimes were already covered by existing statutes.

In general, human trafficking is a form of modern-day slavery that involves the exploitation of persons for commercial sex or forced labor. It frequently involves exploiting women and children, targeting both illegal and legal immigrants. Traffickers routinely use force, fraud or coercion to control their victims. In 2000, the federal "Victims of Trafficking and Violence Protection Act of 2000" was passed to address human trafficking. The purpose of the act was to increase the number of trafficking prosecutions, expand the number of crimes, and enhance penalties. The House bills introduced in 2006 were all modeled, to varying degrees, on the federal act.

The Commission determined, with one exception, that all of the proposed new crimes in the bills were already covered by existing crimes in Virginia. The lone exception was the act of coercing somebody into performing services by withholding their immigration papers or passport (an implied, but not direct, threat). The Commission decided that a separate "Human Trafficking" article is not needed, but instead recommended to insert into Virginia's extortion statute the act of coercion through withholding a person's immigration or identification papers.

Indecent Liberties

During the 2006 Session of the Virginia General Assembly, Delegate Vivian Watts introduced House Bill 585, which would delete the statutory offense of indecent liberties by a custodian or guardian from the Virginia Code, and incorporate that crime into the more general indecent liberties statute. To effectuate this, the bill would add several types of criminal conduct to the indecent liberties statute. The bill would also increase the penalty for certain offenses within that statute. The House Courts of Justice Committee referred this issue to the Commission for study.

To comply with the study request, Commission staff reviewed the legislative history of the indecent liberties statute, and the more recent indecent liberties by a custodian or guardian statute. The genesis of the indecent liberties statute was in 1958, when three criminal statutes were enacted that criminalized indecent exposure, propositioning, or sexually touching a juvenile, under the age of 14, by an adult 21 years of age or older. The age limitation for adults was lowered to 18 years in all three statutes in 1973. These three statutes were combined into one statute in 1975, when Virginia recodified its criminal code and adopted Title 18.2. Over the years, additional changes have been made to the statute: penalties have been increased; second or subsequent offenses receive heightened penalties, the offense of sexually touching a minor was removed entirely from the statute (and was added to the aggravated sexual battery statute), and the age of the victim was raised to under the age of 15.

In 1982, a new statute was created to handle situations where a sexual solicitation was made to a juvenile, older than 14, by a person who was a custodian or guardian. The penalty for this offense was lower than for the general indecent liberties statute, but it could be applied even when the inappropriate solicitation was made to a 17 year old. One of the key elements of this statute was that the inappropriate words or actions were being made by an authority figure, which is what distinguishes this statute from indecent liberties. Over time, this statute has also been amended, but it has always maintained the element of being applicable only when custodians or guardians of the victim are involved.

After deliberation, the Commission decided that the two statutes should be maintained as separate and distinct. Improvements could be made to the indecent liberties statute, but it should not be combined with the indecent liberties by a custodian or guardian statute. The latter statute should not be eliminated, but should be kept as a distinct statute in the Code of Virginia.

The genesis of the indecent liberties statute was in 1958, when three criminal statutes were enacted that criminalized indecent exposure, propositioning, or sexually touching a juvenile, under the age of 14, by an adult 21 years of age or older. The age limitation for adults was lowered to 18 years in all three statutes in 1973. These three statutes were combined into one statute in 1975, when Virginia recodified its criminal code and adopted Title 18.2.

Juvenile Interrogation

During the 2006 Session of the Virginia General Assembly, Delegate Michele McQuigg introduced House Bill 712, which required that juveniles be advised of their rights and whether or not they were free to leave an interrogation. Also, Delegate Albert Eisenberg introduced House Bill 1169 which mandated that all custodial interrogations of juveniles be recorded or the interrogation would be inadmissible at trial. The House Courts of Justice Committee was unable to determine the need or impact of the legislation, so both bills were continued. The House Courts of Justice Committee referred, by letter, both bills to the Commission for further study.

To comply with the study request, the Commission reviewed applicable law, from both the United States Supreme Court and Virginia's appellate courts, concerning the constitutional parameters of detaining and interrogating juveniles. The Commission also surveyed the other 49 states with regard to juvenile interrogation. A subcommittee was formed to develop recommendations for the full Commission.

The subcommittee recommended a requirement that all juvenile interrogations, regarding felonies, be recorded. However, the failure to record an interrogation would only be a factor for the court to consider in determining the statement's admissibility and would not result in an automatic suppression of the statement.

The full Commission declined to adopt the subcommittee's recommendation, but referred the matter to the Department of Criminal Justice Services to create and implement a law enforcement "best practices" guideline on recording juvenile interrogations.

Sex Offenders on School Property

During the 2006 Session of the Virginia General Assembly, Delegate Rob Bell introduced House Bill 1557, which would make it a crime for persons convicted of certain sex offenses to work or volunteer at an elementary or secondary school or child day care center. The Senate Courts of Justice Committee referred, by letter, the substitute version of this bill to the Commission for further study. Delegate Bell supported this referral as an opportunity for the Commission to explore the possibility of requiring all registered sex offenders, convicted of violent sexual offenses, to provide notice to school principals or administrators before being allowed entry onto school grounds.

Staff met with representatives from the Virginia Department of Education, the Virginia Association of Elementary School Principals, the Virginia Association of Secondary School Principals, and the Virginia School Boards Association to seek their perspective on this issue. All of the representatives approved of the basic concept of requiring certain persons on the sex offender registry to provide notice to school officials before they could come on school property.

As the Commission deliberated on this policy idea, it was suggested that the basic goal of any such requirements—to provide protection to students by preventing unannounced or unauthorized visits from sex offenders—could be accomplished by making it a crime for violent registered sex offenders to come on school or child day care center property. If a sex offender had a legitimate reason for coming onto such property, such as the fact that his child was enrolled at the school, he could petition a court for permission. Otherwise, anyone who violated this statute would be guilty of a Class 6 felony.

Staff conducted research and determined that such a scheme, being narrowly drawn and with possible exemptions available through court orders, would most likely not be found unconstitutional by the federal courts. The Commission, therefore, recommended making it a Class 6 felony for any person convicted of a sexually violent offense to come on school or child day care center property. Exceptions would be made for people who were coming on the property to vote, for students

currently enrolled at the school, and for people who had received permission to come on the property by a court order.

Special Conservators of the Peace

During the 2006 Session of the Virginia General Assembly, Delegate Scott Lingamfelter introduced House Bill 1567, which would allow the jurisdiction of special conservators of the peace to be expanded to all areas of the Commonwealth. Provided that a written copy of the original court order was sent, via certified mail, to the Department of Criminal Justice Services and the new area where the special conservator would be exercising his powers. The Senate Courts of Justice Committee referred, by letter, this bill to the Commission for study.

Commission staff reviewed the legislative history of the statute that would be amended by House Bill 1567. Prior to 2003, there were no limits to the geographical area where a special conservator of the peace could exercise his police powers—a judge could allow a special conservator to operate wherever he deemed appropriate. In 2003, the Commission studied the special conservator system in Virginia, and made a number of recommendations, one of which was that judges should not be able to appoint special conservators in geographic areas outside of their judicial circuit. This recommendation was enacted into law by the Virginia General Assembly in 2003.

The statute was modified in 2005 to allow those special conservators that were appointed pursuant to an application by a corporation to exercise their powers in all localities where the corporation, or its subsidiary, held title to real property. This change did represent a departure from the Commission's recommendation in 2003 regarding limited jurisdiction for special conservators.

The proposal in House Bill 1567 would completely reverse the Commission's 2003 recommendation. After discussion, the Commission decided that the policy decisions underlying the original 2003 recommendation were still valid. A judge from one locality in the state should not be able to give a private citizen law enforcement powers in a different locality. Therefore, the Commission decided not to endorse House Bill 1567. Instead, the Commission recommended restoring the language in the relevant statute to its 2003 version.

THE COMMISSION WOULD LIKE TO THANK ALL PEOPLE AND AGENCIES WHO ASSISTED IN THE REFERRED STUDIES FOR 2006.

2007 General Assembly Legislation

Capital Murder

House Bill 2347 (Delegate Gilbert), House Bill 2750 (Delegate Hurt), and Senate Bill 1116 (Senator Rerras)
The bills provide that the willful, deliberate, and premeditated killing of a judge or justice, when the killing is for the purpose of interfering with the judge's official duties, is punishable as capital murder. The bills also make the willful, deliberate, and premeditated killing of any witness under subpoena in a criminal case, when the killing is for the purpose of interfering with the person's duties in such case, punishable as capital murder. All three bills were passed by both the House and Senate, vetoed by the Governor, and became law as chapters 844, 845 and 846, respectively, of the 2007 Acts of Assembly by both the House and Senate overriding the Governor's veto.

House Bill 2348 (Delegate Gilbert) and Senate Bill 1288 (Senator Obenshain)
Both bills redefine the "triggerman rule," which currently provides (with three exceptions) that only the actual perpetrator of a capital murder is eligible for the death penalty and that accessories and principals in the second degree can be punished only as if guilty of first degree murder. These bills keep the three existing exceptions to the "triggerman" rule allowing principals in the second degree and accessories before the fact to be charged as principals in the first degree in the cases of murder for hire, murder involving a continuing criminal enterprise, and terrorism. The bills change the law to permit, in all other cases of capital murder, a principal in the second degree to be tried as a principal in the first degree if he had the same intent to kill as the principal in the first degree. The bill allows an accessory before the fact to be tried as a principal in the first degree if he ordered or directed the willful, deliberate, and premeditated killing. The bills were passed by both the House and Senate, but vetoed by the Governor.

Human Trafficking

House Bill 2264 (Delgate Albo) and Senate Bill 1227
These bills make it a crime to confiscate, withhold or threaten to withhold any actual or purported passport, immigration document, or other government identification document and extort money, property, or pecuniary benefit. HB 2264 was rolled into HB 1921 (Delegate Griffith) and SB 1227 was also rolled into SB 815 (Senator Cuccinelli). Both combined bills were passed by the House and Senate and signed into law by the Governor as 453 and 547, respectively, of the Acts of Assembly.

Sex Offenders in Nursing Homes

House Bill 2345 (Delegate Bell) and Senate Bill 1229 (Senator Howell)
Both bills require nursing homes, certified nursing facilities, and assisted living facilities to register with the Department of State Police to receive automatic notification of the registration of sex offenders within the same or a contiguous zip code area as the home or facility. These bills also require such entities to discover, before admission, whether a potential resident is a registered sex offender if the potential resident will stay for more than three days. Both bills passed both the House and Senate, and were signed into law by the Governor as chapters 119 and 164, respectively, of the 2007Acts of Assembly.

House Bill 2346 (Delegate Bell) and Senate Bill 1228 (Senator Howell)
These bills require nursing homes and assisted living facilities, at the time a resident is admitted and during his stay, to provide the resident with notice of Virginia's sex offender registry, and how to access the registry on the State Police's website. Both bills passed the House and Senate, and were signed into law by the Governor as chapters 120 and 163, respectively, of the 2007 Acts of Assembly.

Sex Offenders on School Property

House Bill 2344 (Delegate Bell) and Senate Bill 927 (Senator Norment)
These bills provide that an adult who has been convicted of a sexually violent offense is guilty of a Class 6 felony if he enters or is present, during school hours, on any property he knows or has reason to know is a public or private elementary or secondary school or child day center property. There are exceptions if the person: (i) is voting; (ii) is a student enrolled at the school; or (iii) has received a court order allowing him to enter upon such property. The bills provide that an adult, otherwise prohibited from entering school property, may petition the juvenile and domestic relations district court or circuit court in the county or city where the school or child day center is located for permission to enter such property. For good cause shown, the court may issue an order permitting the petitioner to enter and be present on such property, subject to restrictions the court deems appropriate. The bills were passed by both the House and Senate and signed into law by the Governor as chapters 284 and 370, respectively, of the 2007Acts of Assembly

Special Conservators of the Peace

House Bill 2349 (Sherwood) and Senate Bill 1165 (Stolle)
These bills provide that in the case of a corporation or business applicant, special conservators of the peace may be granted the authority to act as law enforcement agents on any real property owned or leased by the corporation or business, including any subsidiaries. The authority of the special conservator of the peace, outside the geographical limitations within the judicial circuit where the appointment is made, is limited to the boundaries of such real property and the appointment order must specifically name the cities and counties where this additional jurisdiction will be valid. The bills were passed by both the House and Senate and signed into law by the Governor as chapters 481 and 380, respectively, of the 2007 Acts of Assembly.