

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

**Impact of Barrier Crime Laws on
Social Service and Health Care
Employers**

**TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA**



SENATE DOCUMENT NO. 11

**COMMONWEALTH OF VIRGINIA
RICHMOND
2008**



COMMONWEALTH of VIRGINIA
Joint Commission on Health Care

Delegate Phillip A. Hamilton
Chairman

Kim Snead
Executive Director

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April 23, 2008

The Honorable Timothy M. Kaine
Governor of Virginia
Patrick Henry Building, 3rd Floor
1111 East Broad Street
Richmond, VA 23219

Members of the Virginia General Assembly
General Assembly Building
Richmond, VA 23219

Dear Governor Kaine and Members of the General Assembly:

The 2006 General Assembly in Senate Joint Resolution 106 directed the Joint Commission on Health Care to conduct a two-year study of "the impact of barrier crimes laws on social services and health care employers, prospective employees, consumers, residents, patients, and clients." An interim report was submitted in 2007. During the 2008 General Assembly Session, legislation was enacted to ease a few restrictions related to employment within adult mental health treatment programs (*2008 Acts of Assembly Chapters 383 and 407*).

Enclosed for your review and consideration is the final report.

Respectfully submitted,

A handwritten signature in black ink that reads "Phillip A. Hamilton".

Phillip A. Hamilton
Chairman

Code of Virginia § 30-168.

The Joint Commission on Health Care (the Commission) is established in the legislative branch of state government. The purpose of the Commission is to study, report and make recommendations on all areas of health care provision, regulation, insurance, liability, licensing, and delivery of services. In so doing, the Commission shall endeavor to ensure that the Commonwealth as provider, financier, and regulator adopts the most cost-effective and efficacious means of delivery of health care services so that the greatest number of Virginians receive quality health care. Further, the Commission shall encourage the development of uniform policies and services to ensure the availability of quality, affordable and accessible health services and provide a forum for continuing the review and study of programs and services.

The Commission may make recommendations and coordinate the proposals and recommendations of all commissions and agencies as to legislation affecting the provision and delivery of health care.

For the purposes of this chapter, "health care" shall include behavioral health care.

Joint Commission on Health Care Membership

Chairman

The Honorable Phillip A. Hamilton

Vice-Chairman

The Honorable Stephen H. Martin

Senate of Virginia

The Honorable J. Brandon Bell, II

The Honorable Harry B. Blevins

The Honorable R. Edward Houck

The Honorable Benjamin J. Lambert, III

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Preface

Senate Joint Resolution 106 introduced by Senator Devolites-Davis during the 2006 General Assembly Session directed the Joint Commission on Health Care (JCHC) to study the impact of barrier crime laws on social service and health care employers, and to present its findings to the Governor and the 2008 General Assembly. Barrier crime laws prohibit persons convicted of certain statutorily-defined crimes from obtaining employment with employers specializing in the care of vulnerable populations, such as children, the elderly, and those with mental disabilities. The *Code of Virginia* § 63.2-1719 and § 37.2-314 list 89 felonies and 21 misdemeanors as barrier crimes relating to social services and health care employers.

JCHC staff convened a workgroup to discuss the provisions of SJR 106. Research findings and the testimony of workgroup stakeholders revealed that persons with a history of mental illness and/or substance abuse problems often have criminal backgrounds related to their illness or substance abuse problems, and consequently have difficulty obtaining employment, making rehabilitation more difficult. Moreover, some employers, particularly health and social service providers, also have difficulty obtaining a qualified workforce.

Although workforce shortages affect many of the health and social service providers in Virginia, most of the workgroup participants indicated they were not interested in changing the barrier crime laws affecting their services. However, this was not the sentiment expressed by representatives of community services boards (CSBs). CSB representatives suggested removing the current barrier crimes provisions pertaining to employment in adult substance abuse and adult mental health treatment programs and allowing consideration of an individual's entire criminal record. They also suggested providing for a rehabilitation assessment for employment of individuals with serious mental illness similar to the assessment allowed for individuals with substance use disorder.

Virginia law allows individuals with substance use disorder, with certain barrier crimes on their records, to be assessed for rehabilitation and therefore become eligible to work in direct care within an adult substance use program. There is no similar provision in Virginia law to assess individuals with mental illness and certain barrier crimes on their records to qualify for rehabilitation assessment for employment. Individuals with serious mental illness who have assault records typically are ineligible to be employed as peer counselors. Often, these assaults involved a family member or a law enforcement officer during the emergency custody or temporary detention process. Many mental health service consumers could benefit from peer contact, similar to the benefits enjoyed by consumers with substance use disorder. The CSBs estimate that more than 40

individuals would qualify for employment, if they could be assessed for rehabilitation in the same manner as allowed for substance use disorders.

Based on the two-year JCHC study, staff presented legislative options to JCHC who voted to introduce legislation to allow certain individuals with mental illness to be assessed for rehabilitation for potential employment in adult substance abuse and adult mental health treatment programs.

HB 1203 (Melvin) and SB 381 (Martin), as passed by the 2008 General Assembly, amended *Code of Virginia* §§ 37.2-506, 37.2-416 to allow persons convicted of one misdemeanor offense under §§ 18.2-57(A) to also be assessed for rehabilitation as set forth in §§ 37.2-506(C) and (D), 37.2-416(C) and (D); Specified that the rehabilitation assessment will apply only to persons seeking employment in adult substance abuse programs or adult mental health programs and that the criminal behavior was substantially related to the substance abuse disorder and/or mental illness.

On behalf of the Joint Commission and staff, I would like to thank the numerous individuals who assisted in this study, including representatives from the Alzheimer's Association of Virginia; Department of Mental Health, Mental Retardation and Substance Abuse Services - Office of Substance Abuse Services; Substance Abuse and Addiction Recovery Alliance (SAARA) of Northern Virginia; SAARA of Virginia; Virginia Assisted Living Association; Virginia Association for Home Care & Hospice; Virginia Association of Community Services Boards; Virginia Association for Nonprofit Homes for the Aging; Virginia Health Care Association; and, Virginia Network for Private Providers.

Kim Snead
Executive Director

April 2008

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October 26, 2007 Presentation to JCHC

Appendix A:
Senate Joint Resolution 106 (2006)

Impact of Barrier Crime Laws on Social Service and Health Care Employers

Authority for Study

Senate Joint Resolution 106 (2006) introduced by Senator Devolites-Davis directs the Joint Commission on Health Care (JCHC) to “study the impact of barrier crime laws on social service and health care employers, prospective employees, consumers, residents, patients, and clients.” SJR 106 requires the review of barrier crime laws to: “(i) determine their effectiveness in protecting consumers, residents, patients, and clients; (ii) examine the difficulty experienced by employers in service delivery agencies in finding qualified applicants and employees; as well as the difficulty experienced by prospective employees in finding jobs; (iii) compare Virginia’s barrier crimes laws with laws related to criminal convictions and employment in other states; and, (iv) gather data on employment discrimination based on an individual’s criminal conviction record from state agencies, institutions, boards, bureaus, commissions, councils, or any instrumentality of the Commonwealth.”

In conducting the study, JCHC staff were asked to “consider comments from affected entities, including representatives of long-term care providers and advocacy groups, and the Virginia Association of Community Service Boards; the Substance Abuse and Addiction Recovery Alliance; the Consortium of Substance Abuse Organizations; the Virginia Association of Drug and Alcohol Programs; the Virginia Association of Alcoholism and Drug Abuse Counselors; the Department of Mental Health, Mental Retardation and Substance Abuse Services; The Department for the Aging; and, the Department of Rehabilitative Services.”

Background

Barrier crime laws came into existence to protect the most vulnerable populations. The laws prohibit persons convicted of certain statutorily-defined crimes from obtaining employment with employers specializing in the care of vulnerable populations, such as children, the elderly, and those with mental disabilities. A 2006 study conducted by the U.S. Department of Health and Human Services (HHS) determined that:

- Criminal background checks are a valuable tool for employers during the hiring process;
- The use of criminal background checks during the hiring process does not limit the pool of potential job applicants;
- “A correlation exists between criminal history and incidences of abuse;” and,
- The long-term care industry supports the practice of conducting background checks on potential employees in order to reduce the likelihood of hiring someone who has potential to harm residents.

Research indicates that as workplace violence and crime rates grew, as well as negligent hiring lawsuits, the list of barrier crime laws and mandatory background checks also

grew. Since the passage of the first barrier crime law in Virginia in 1996, the list of crimes has become more exhaustive and the requirements more stringent.

Virginia's Barrier Crime Laws

Virginia has barrier crime laws relating to the following social services and health care employers:

- Child Welfare Agencies (§ 63.2-1721),
- Foster or Adoptive Homes approved by Child Placing Agencies (§ 63.2-1721),
- Family Day Homes approved by Family Day Systems (§ 63.2-1721),
- Unlicensed and Licensed Exempt Child Day Centers (§ 63.2-1724),
- Child Day Centers and Family Day Homes (§§ 63.2-1725, 63.2-1720),
- Assisted Living Facilities (§§ 63.2-1721, 63.2-1720),
- Adult Day Centers (§ 63.2-1720),
- Licensed Nursing Homes (§ 32.1-126.01),
- Licensed Home Care Organization, Home Care Organization Exempt from Licensure, and Licensed Hospice (§ 32.1-162.9:1),
- Community Service Boards (§ 37.2-506),
- Behavioral Health Authority (§ 37.2-607), and
- Department of Mental Health, Mental Retardation and Substance Abuse Services (§ 37.2-416).

The following crimes listed in the *Code of Virginia* § 63.2-1719 and § 37.2-314 are barrier crimes for all social service and health care entities. The 89 felonies include:

Murder,	Malicious Wounding by mob,
Abduction,	Abduction for Immoral Purpose,
Assaults & Bodily Wounding,	Robbery,
Carjacking,	Felony Stalking,
Threats of death or bodily injury,	Sexual Assault,
Arson,	Drive-by Shooting,
Use of Machine Gun,	Aggressive use of Machine Gun,
Use of Sawed-off Shotgun,	Pandering,
Incest,	Taking Indecent liberties, custodial relationship,
Abuse & Neglect of Children,	Poss. of Pornography with intent to distribute,
Possession of child pornography,	Electronic Facilitation of Pornography,
Abuse & Neglect of Incap. Adults,	Delivery of Drugs to Prisoners
Escape from Jail, and	Felonies by Prisoners.

The 21 misdemeanors that can be barriers to employment include hazing, simple assault, failure to secure medical attention, employing or permitting a minor to assist in an act constituting an obscenity offense, arson and sexual battery. Additional barrier crimes, such as burglary, extortion by threat and drug related felonies apply only to child welfare agencies, foster and adoptive homes, children's residential facilities, as well as CSBs, BHAs and DMHMRSAS employees in direct consumer care positions.¹

The *Code of Virginia* outlines additional barrier crimes for specific social services employers. For child welfare agencies or foster and adoptive homes approved by child placing agencies, the additional barriers to employment include:

¹ *Code of Virginia* § 37.2-314.

- Burglary;
- Felony violation relating to possession or distribution of drugs;
- Conviction of any other felony not included in the definition of barrier crime unless 5 years have elapsed since conviction;
- A founded complaint of child abuse and neglect; and,
- Prior adult convictions and juvenile convictions or adjudications of delinquency based on a crime that would be a felony if committed by an adult within or outside the Commonwealth.²

For children’s residential facilities convictions for extortion by threat, burglary, felony distribution of drugs, felony violation relating to drug possession in the five years prior to the application, and felony convictions relating to drug possession while still on probation or parole or having failed to pay court costs are barriers to employment, volunteer work or providing services on a regular basis.³

The Department of Mental Health, Mental Retardation and Substance Abuse Services (DMHMRSAS) defines its barrier crimes in *Code of Virginia* § 37.2-314.

This section expands upon the list in *Code of Virginia* § 63.2-1719 and also includes burglary, extortion by threat, and distribution and possession of drugs as bars to employment. This statutory provision applies to DMHMRSAS employees in direct consumer care positions, as well as community services boards (CSBs) and behavioral health authorities (BHAs) in direct consumer care positions. It also applies to persons who accept employment at a State facility, or facility that receives, monitors, or disburses funds, and were not employed by DMHMRSAS prior to July 1, 1996.

Virginia Barrier Crime Laws Exceptions

There are some statutory exceptions to Virginia’s barrier crime laws. For example, a licensed assisted living facility or adult day care center, licensed nursing home, home care organization or hospice may hire a person convicted of one misdemeanor barrier crime not involving abuse or neglect, if five years have elapsed following the conviction.⁴ A child day center, children's residential facility, DMHMRSAS provider, CSB, or BHA may hire persons who have been convicted of not more than one misdemeanor offense of assault and battery if ten years have elapsed following the conviction, unless the person committed the offense during the scope of employment or the object of the offense was a minor.⁵

Screening Process for Employment at Adult Substance Abuse Treatment Programs

In addition, a screening process has been added in statute to allow CSBs, BHAs and

²*Code of Virginia* § 63.2-1719.

³ *Id.*

⁴ *Code of Virginia* §§ 63.2-1720, 32.1-126.01, 32.1-162.9:1.

⁵ *Code of Virginia* §§ 37.2-416, 37.2-506, 37.2-607, 63.2-1720, 63.2-1726.

DMHMRSAS providers to consider for employment in adult substance abuse treatment programs only, persons convicted of certain barrier crime offenses including:

- Unlawful hazing (§ 18.2-56);
- Reckless handling of a firearm (§ 18.2-56.1);
- Any misdemeanor or felony violation related to:
 - reckless endangerment of others by throwing objects (§ 18.2-51.3);
 - threat (§ 18.2-60),
 - breaking and entering a dwelling house with intent to commit misdemeanor in (§18.2-92),
 - possession of burglarious tools (§ 18.2-94),
 - any felony violation relating to distribution of drugs, except an offense pursuant to subsections H1 or H2 of § 18.2-248, or
- An equivalent offense in another state.⁶

Eligibility for screening requires that the applicant shall (i) have completed all prison or jail terms; (ii) not be under probation or parole supervision; (iii) have no pending charges in any locality; (iv) have paid all fines, restitution, and court costs for any prior convictions; and, (v) have been free of parole or probation for at least five years for all convictions. Screening will determine (i) if the criminal behavior was substantially related to the applicant's substance abuse; and, (ii) whether the applicant has been successfully rehabilitated and is not a risk to consumers based on the criminal history background and substance abuse history.

Federal Laws

In general, the federal government does not preclude employment by social services and health entities, but allows states to conduct national background checks in a few specific instances. Individuals who want to provide foster or adoptive home care must have background checks conducted through national crime information databases and state child abuse registries.⁷ Convictions warranting mandatory exclusion under this law include program-related crimes, patient abuse, health care fraud and controlled-substance related crimes.⁸

The National Child Protection Act allows states to conduct a nationwide criminal history background check for the purpose of determining whether an individual who will have unsupervised access to children, the elderly, or individuals with disabilities has been convicted of a crime that would affect the fitness of the individual to provide care to or have responsibility for the safety and well-being of children, the elderly, or individuals with disabilities.⁹ In addition, Section 307 of the Medicare Prescription Drug, Improvement and Modernization Act of 2003 directs the Secretary of Health and Human Services (HHS), in consultation with the Attorney General, to establish procedures for conducting background checks on prospective direct patient access employees providing long term care.¹⁰ These procedures are being developed through a

⁶ *Code of Virginia* §§ 37.2-506, 37.2-416.

⁷ Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (2006).

⁸ *Id.*

⁹ National Child Protection Act, 42 U.S.C. § 5119a (1993).

¹⁰ Medicare Prescription Drug, Improvement and Modernization Act, Pub. L. No. 108-173 (2003).

pilot project involving the following states: Alaska, Idaho, Illinois, Michigan, Nevada, New Mexico and Wisconsin. Federal legislation that would establish additional background checks for direct access employees of long term care facilities and providers is being considered by Congress.¹¹ The enforcement provisions of each of these bills provides that any state that fails to enforce the provisions of this legislation would be excluded from participation under the Medicare and Medicaid programs.

Other States

States differ in the degree and manner in which they mandate employment restrictions based on the criminal record of the applicants in social service and health care fields. For example, the majority of states require background checks for licensing/employment purposes, but not all of those states list the barrier crimes in *Code*; barrier crimes might be listed in the Administrative Rules and Regulations of the state, or there may be no specific barrier crimes leaving the hiring decision at the discretion of the employing/licensing entity. The types of barrier crimes also vary across the states from the generalized, “all felonies,” to the specific, violent crimes. Additionally, the entities with barrier crime restrictions also vary across the states; some states limit barrier crimes to entities that deal with children while others have barrier crimes for all entities that deal with vulnerable populations.

Alaska is an example of a state that provides levels of barrier crimes for employment an area serving a vulnerable population. Depending on the level of crime, the regulations specify 1, 3, 5 and 10 year periods of ineligibility, as well as permanent ineligibility. The most violent crimes are permanent barriers to employment. Additionally, two or more felonies of any type are also a permanent barrier to employment. However, a misdemeanor for domestic violence constitutes a barrier crime for one year.

Colorado allows assessment of a disqualification of eligibility for employment. Assessment is only allowed for certain misdemeanors, and only after a certain period of time has elapsed. Florida provides levels of screening based on the type of employment sought, but also allows exemptions from disqualification. Felonies and misdemeanors can be exempted after a certain amount of time has elapsed and after weighing the mitigating circumstances.

Illinois and New Jersey list the barrier crimes in Code; however, they allow an individual to request a waiver/reconsideration for any crime. This waiver is granted after an evaluation of the evidence and the mitigating circumstances. In New Jersey, the individual must affirmatively demonstrate rehabilitation.

Discrimination Issues

“The widespread availability of criminal record information has made it easier for

¹¹ S.1577, H.R.3078, H.R.1476, 109th Cong. (2007).

employers and licensing boards to identify and reject people with a criminal record.”¹² Title VII of the Civil Rights Act of 1964 establishes parameters affecting the scope of a potential employer’s inquiries about prior arrests, convictions, and other aspects of the applicant’s criminal history. Under Title VII, employers may exclude applicants with arrest or conviction records if they can prove that the applicant’s criminal history prevents the latter from satisfying certain job requirements. Employers can usually defend Title VII challenges by availing themselves of the “business necessity” defense.

Thirty-three states, including Virginia, have laws to limit consideration of conviction in connection with employment and/or licensing decisions, requiring that the offense be substantially or directly related to the license and/or employment sought. A few states allow consideration of an offender’s rehabilitation, establishing a standard that, if met, precludes denial of licensure or employment. In a few states rehabilitation is presumed after passage of a certain period of time. Some states have codified their policies of eradicating discrimination based on criminal records (CT, NJ, NY). Wisconsin and Hawaii have enacted fair employment laws that expressly preclude, absent an exception, employment discrimination based on a criminal record. Yet, these general nondiscrimination laws do not apply to specific prohibitions under state or federal law for particular jobs or licenses that deal with vulnerable populations.

Liability Issues

Under the negligent hiring doctrine, an employer could be liable for harm resulting from an employee’s conduct if the employer hires a person with known propensities, or propensities which should have been discovered by reasonable investigation, in a position in which it should have been foreseeable that the employee posed a threat to others.¹³ Under the doctrine of respondeat superior, an employer is also vicariously liable for an employee’s acts that were committed within the “scope of employment.” Liability under the negligent hiring doctrine allows a plaintiff to recover in circumstances where the respondeat superior, “scope of employment” limitation protects employers from liability.¹⁴

Enactment of a statutory employment or licensing requirement imputes a duty of care onto employers in the industry governed by the provision. In some states, an employer’s failure to perform a state-mandated criminal background check is considered negligence per se in a negligent hiring case.¹⁵ In Virginia, such a failure could be considered negligence per se. In other states, the failure is admissible as evidence of negligence.¹⁶

¹² Margaret Colgate Love, *Relief from the Collateral Consequences of a Criminal Conviction: A State-by-State Resource Guide*, (William S. Hein & Co.) (May 2006).

¹³ *Southeast Apartments Management, Inc, et al v. Jackman*, 257 Va. 256 (1999).

¹⁴ *Interim Personnel of Central VA, Inc. v. Messer*, 263 Va. 435 (2002).

¹⁵ *Mahan v. Am-Guard, Inc.*, 2003 Pa. Super. Ct. 510; *Mueller by Math v. Community Consolidated School District 54*, 678 N.E. 2d 660 (Ill. Ct. App. 1997).

¹⁶ *Combes v. Molalla Transport Sys., Inc.*, 831 P.2d. (Col. 1992).

The Transformation Initiative

Whereas the barrier crime laws for employers are becoming more expansive and restrictive, a different movement is occurring in the mental health and substance abuse arena. Specifically, the President launched the New Freedom Commission on Mental Health with the purpose of transforming the mental health system by focusing on recovery and making mental health care consumer and family driven. Virginia has in place its own System Transformation Initiative to transform Virginia's mental health system into one that focuses on recovery, self-determination and empowerment. The vision of the transformed system is that every person with a substance use disorder and/or mental illness can achieve some level of recovery.¹⁷

Consumers of substance abuse services face severe shortages of core services needed for successful recovery in the community, including, affordable housing, reliable transportation, and employment assistance.¹⁸ "Many substance abuse treatment professionals enter the field having experienced significant personal problems with drug and alcohol problems or having had close family members with serious problems:

- 27% of staff identified themselves as being in recovery from drug or alcohol addiction. 81% make this fact known to the persons they serve;
- 64% responded that they have been significantly affected by the substance use disorder of a close family member.

Consumers who were interviewed often mentioned that they value working with staff members who are in recovery."¹⁹ Evidence suggests that peer support can play an important role in the recovery process. Enforcement of absolute barrier crimes with no opportunity to determine whether intervening factors (particularly those related to an individual's substance use disorder or mental illness) should be considered contradicts the principles of a transformed mental health system.

Workgroup

In March 2007, JCHC staff convened a workgroup to discuss the provisions of SJR 106. The workgroup included representatives from various stakeholders, including:

- Alzheimer's Association of Virginia;
- DMHMRSAS - Office of Substance Abuse Services;
- Substance Abuse and Addiction Recovery Association (SAARA) of Northern Virginia;
- SAARA of Virginia
- Virginia Assisted Living Association;
- Virginia Association of Community Services Boards;
- Virginia Association for Home Care & Hospice;

¹⁷ Dr. James Reinhard, *The System Transformation Initiative*, 2006, available at <http://www.dmhmrzas.virginia.gov/PressReleases/admPR-Transformatio.htm>.

¹⁸ Virginia Office of the the Inspector General for Mental Health, Mental Retardation and Substance Abuse Services, *Review of Community Services Board Substance Abuse Outpatient Services for Adults*, (Report: #129-06) (August 2006).

¹⁹ *Id.*

- Virginia Association for Nonprofit Homes for the Aging;
- Virginia Health Care Association; and
- Virginia Network for Private Providers.

Staff also held meetings with representatives from the Virginia Department of Health and the Virginia Department of Social Services. Research findings and the testimony of stakeholders revealed that persons with a history of mental illness and/or substance abuse problems often have criminal backgrounds related to their illness or substance abuse problems, and often have difficulty obtaining employment, making rehabilitation more difficult. “The collateral consequences of conviction have grown more numerous and more disabling...and can frustrate the chances of successful offender reentry” into society.”²⁰ It is difficult to determine the number of individuals in Virginia who have been denied employment because of a criminal conviction. Additionally, it is impossible to determine the number of qualified individuals who do not apply for positions because they do not want to undergo a background check. However, from July 1, 2006- December 30, 2006, the Virginia State Police received 16,601 requests for background checks.

- 13,708 resulted in a no “hit” for a barrier crime.
- 2,893 resulted in a “hit” for a barrier crime and/or qualified for assessment, but required more research for verification.
- The VSP does not track the number of persons out of the 2,893 possible hits for barrier crimes that are actually denied employment because of a barrier crime in their background.

Additionally, employers also have difficulty obtaining a qualified workforce. Yet, although workforce shortages affect most of the health and social service providers in Virginia, most of the workgroup participants indicated they were not interested in changing the barrier crime laws affecting their services. This, however, was not the sentiment expressed by representatives of CSBs who suggested removing the current barrier crimes provisions pertaining to employment in adult substance abuse and adult mental health treatment programs and allowing consideration of an individual’s entire criminal record. They also suggested providing for a rehabilitation assessment for employment of individuals with serious mental illness similar to the assessment allowed for individuals with substance use disorder.

As noted previously, Virginia law allows individuals with substance use disorder and certain barrier crimes on their record be assessed for rehabilitation and therefore become eligible to work in direct care within an adult substance use program. No similar provision in Virginia law exists to allow individuals with mental illness and certain barrier crimes on their record to qualify for rehabilitation assessment. Individuals with serious mental illness may have assaults in their background making them ineligible to be employed as peer counselors. Often, these assaults involved a family member or a law enforcement officer during the ECO/TDO process. Many individuals with serious mental illness could benefit from peer contact, as individuals with substance use disorder benefit from peer contact. The CSBs estimate that more

²⁰ Margaret Colgate Love, *Relief from the Collateral Consequences of a Criminal Conviction: A State-by-State Resource Guide*, (William S. Hein & Co.) (May 2006).

than 40 mental health consumers would qualify for employment, if they could be assessed for rehabilitation in the same manner as allowed for substance use disorder.

Policy Options

Option 1: Take no action.

One comment was received in support of Option 1.

Option 2: Introduce legislation to remove the barrier crime provisions from *Code of Virginia* §§ 37.2-506, 37.2-416 and allow CSBs, BHAs and DMHMRSAS to consider the entire criminal background record, along with all other relevant information, when hiring persons in direct consumer care positions in adult mental health and/or substance abuse programs. This would have the effect of removing all barrier crimes placing the full responsibility for making the hiring decision on the employing entity.

Fourteen comments were received in support of Option 2.

One comment supports this option, if the barrier crimes remain in the Code as a guideline.

Option 3: Introduce legislation to amend the *Code of Virginia* §§ 37.2-506, 37.2-416 to allow for a rehabilitation assessment for any applicant who has been convicted of a barrier crime, unless the offense was intentional violent harm against an adult or child, to work in adult substance abuse or adult mental health treatment programs.

Ten comments were received in support of Option 3.

One comment was received in opposition.

Option 4: Introduce legislation to amend *Code of Virginia* §§ 37.2-506, 37.2-416 to provide a screening option for consumers with serious mental illness to be assessed for employment in adult mental health and/or adult substance abuse treatment centers.

Four comments were received in support of Option 4.

Two comments opposed this option.

Option 5: Introduce legislation to amend *Code of Virginia* §§ 37.2-506, 37.2-416 to allow persons convicted under §§ 18.2-57(A) and 18.2-57.2(A) to also be assessed for rehabilitation as set forth in §§ 37.2-506(C) and (D), 37.2-416(C) and (D); Specify that the rehabilitation assessment will apply only to persons seeking employment in adult substance abuse programs and adult mental health programs and that the criminal behavior was substantially related to the substance abuse disorder and/or mental illness.

VACSB indicated its full support for Option 5.

JCHC Staff for this Report

Jaime H. Hoyle

Senior Staff Attorney/Health Policy Analyst



Virginia Joint Commission
on Health Care



Final Report: Impact of Barrier Crime Laws

SJ 106 (Patron: Senator Devolites-Davis)

Jaime H. Hoyle
Sr. Staff Attorney/Health Policy Analyst
October 26, 2007



Authority for the Study

- ▶ SJR 106 (2006) directs JCHC to study the impact of barrier crime laws on social service and health care employers.
- ▶ Specifically, JCHC shall:
 - ▶ Determine the effectiveness of barrier crimes laws in protecting consumers, residents, patients, and clients;
 - ▶ Examine the difficulty experienced by employers in finding qualified applicants and employees and the difficulty experienced by prospective employees in finding jobs;
 - ▶ Compare Virginia's barrier crimes laws with laws related to criminal convictions and employment in other states; and,
 - ▶ Gather data on employment discrimination based on an individual's criminal conviction record from state agencies, institutions, boards, bureaus, commissions, councils, or any instrumentality of the Commonwealth.



Authority for the Study (cont.)

- ▶ In conducting the study, JCHC staff shall consider comments from affected entities, including:
 - ▶ Representatives of Long-Term Care Providers and Advocacy Groups;
 - ▶ The Virginia Association of Community Service Boards;
 - ▶ The Substance Abuse and Addiction Recovery Alliance;
 - ▶ The Consortium of Substance Abuse Organizations;
 - ▶ The Virginia Association of Drug and Alcohol Programs;
 - ▶ The Virginia Association of Alcoholism and Drug Abuse Counselors;
 - ▶ The Department of Mental Health, Mental Retardation and Substance Abuse Services (DMHMRSAS);
 - ▶ The Department for the Aging; and,
 - ▶ The Department of Rehabilitative Services.



Presentation Outline

- *Rationale for Barrier Crime Laws*
- Virginia's Barrier Crime Laws
- Federal Laws
- Discrimination and Liability Issues
- Transformation Initiative
- Workgroup Discussions and Recommendations
- Other States
- Policy Options



Rationale for Barrier Crime Laws

- ▶ Barrier crime laws came into existence to protect the most vulnerable populations.
- ▶ Research indicates that as workplace violence and crime rates grew, as well as negligent hiring lawsuits, the list of barrier crime laws and mandatory background checks also grew.
- ▶ Since the passage of the barrier crime law in Virginia, the list of crimes has become more exhaustive and the requirements more stringent.



Rationale for Barrier Crime Laws

- ▶ A 2006 study conducted by the U.S. Department of Health and Human Services (HHS) determined that:
 - ▶ Criminal background checks are a valuable tool for employers during the hiring process,
 - ▶ The use of criminal background checks during the hiring process does not limit the pool of potential job applicants,
 - ▶ “a correlation exists between criminal history and incidences of abuse,” and
 - ▶ The long-term care industry supports the practice of conducting background checks on potential employees in order to reduce the likelihood of hiring someone who has potential to harm residents.



Presentation Outline

- Rationale for Barrier Crime Laws
- Virginia's Barrier Crime Laws*
- Federal Laws
- Discrimination and Liability Issues
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- Workgroup Discussions and Recommendations
- Other States
- Policy Options

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Virginia's Barrier Crime Laws

- ▶ Virginia's barrier crime laws prohibit persons convicted of certain statutorily-defined crimes from obtaining employment with certain employers, mostly those employers specializing in the care of vulnerable populations, such as children, the elderly, and those with mental disabilities.

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Virginia's Barrier Crime Laws

- ▶ As noted previously, this study is focusing on barrier crime laws as they relate to social services and health care employers which include:
 - ▶ Social service agencies as defined in *Code of Virginia*, Title 63.2:
 - ▶ Child Welfare Agencies (§63.2-1721),
 - ▶ Foster or Adoptive Homes approved by Child Placing Agencies (§63.2-1721),
 - ▶ Family Day Homes approved by Family Day Systems (§63.2-1721),
 - ▶ Unlicensed and Licensed Exempt Child Day Centers (§63.2-1724),
 - ▶ Child Day Centers and Family Day Homes (§§63.2-1725, 63.2-1720),
 - ▶ Assisted Living Facilities (§§63.2-1721, 63.2-1720), and
 - ▶ Adult Day Centers (§63.2-1720).



Virginia's Barrier Crime Laws

- ▶ Health care entities as defined in *Code of Virginia*, Title 32.1:
 - ▶ Licensed Nursing Homes (§32.1-126.01), and
 - ▶ Licensed Home Care Organization, Home Care Organization Exempt from Licensure, and Licensed Hospice (§32.1-162.9:1).
- ▶ Behavioral health care facilities as defined in *Code of Virginia*, Title 37.2:
 - ▶ Community Service Boards (§37.2-506),
 - ▶ Behavioral Health Authority (§37.2-607), and
 - ▶ DMHMRSAS (§37.2-416).



Virginia Barrier Crime Laws

- ▶ The following crimes listed in the *Code of Virginia* § 63.2-1719 and §37.2-314 are barrier crimes for all social service and health care entities. The 28 felonies include:
 - ▶ Murder,
 - ▶ Abduction,
 - ▶ Assaults & Bodily Wounding,
 - ▶ Carjacking,
 - ▶ Threats of death or bodily injury,
 - ▶ Arson,
 - ▶ Use of Machine Gun,
 - ▶ Use of Sawed-off Shotgun,
 - ▶ Incest,
 - ▶ Taking Indecent liberties,
 - ▶ Abuse & Neglect of Children,
 - ▶ Possession of child pornography,
 - ▶ Abuse & Neglect of Incap. Adults,
 - ▶ Escape from Jail, and
 - ▶ Malicious Wounding by mob,
 - ▶ Abduction for Immoral Purpose,
 - ▶ Robbery,
 - ▶ Felony Stalking,
 - ▶ Sexual Assault,
 - ▶ Drive-by Shooting,
 - ▶ Aggressive use of Machine Gun,
 - ▶ Pandering,
 - ▶ Crimes Against Nature involving Children,
 - ▶ Taking Indecent liberties, custodial relationship,
 - ▶ Poss. of Pornography with intent to distribute,
 - ▶ Electronic Facilitation of Pornography,
 - ▶ Delivery of Drugs to Prisoners,
 - ▶ Felonies by Prisoners.
- ▶ The 2 misdemeanors are:
 - ▶ Failure to secure medical attention, and
 - ▶ Employing or permitting a minor to assist in an act constituting an offense under Article 5 (§18.2-372 et seq.)

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Additional Barrier Crimes for Specific Social Services Employers

- ▶ For child welfare agencies or foster and adoptive homes approved by child placing agencies, the following are additional barriers to employment under §63.2-1719:
 - ▶ Burglary;
 - ▶ Felony violation relating to possession or distribution of drugs;
 - ▶ Conviction of any other felony not included in the definition of barrier crime unless 5 years have elapsed since conviction;
 - ▶ A founded complaint of child abuse and neglect; and,
 - ▶ Prior adult convictions and juvenile convictions or adjudications of delinquency based on a crime that would be a felony if committed by an adult within or outside the Commonwealth.
- ▶ For children's residential facilities the following are additional barriers to employment, volunteer work, or providing services on a regular basis under §63.2-1719:
 - ▶ Extortion by threat, burglary, felony distribution of drugs, felony violation relating to drug possession in the 5 years prior to the application, and felony convictions relating to drug possession while still on probation or parole or having failed to pay court costs.

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Additional Barrier Crimes for Behavioral Health Care Employers

- ▶ DMHMRSAS defines its barrier crimes in *Code of Virginia* §37.2-314.
 - ▶ This section expands upon the list in §63.2-1719 and also includes the following as a bar to employment:
 - ▶ Burglary,
 - ▶ Extortion by Threat,
 - ▶ Distribution of drugs, and
 - ▶ Possession of drugs.
 - ▶ This section applies to DMHMRSAS employees in direct consumer care positions, as well as CSBs and BHAs in direct consumer care positions.
 - ▶ This section also applies to persons who accept employment at a State facility, or facility that receives, monitors, or disburses funds, and were not employed by DMHMRSAS prior to July 1, 1996.

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Virginia Barrier Crime Laws Exceptions

- ▶ There are some statutory exceptions to Virginia's barrier crime laws.
 - ▶ "A licensed assisted living facility or adult day care center may hire an applicant convicted of one misdemeanor barrier crime not involving abuse or neglect, if five years have elapsed following the conviction." *Code of Virginia* §63.2-1720.
 - ▶ "A child day center may hire for compensated employment persons who have been convicted of not more than one misdemeanor offense under § 18.2-57 if 10 years have elapsed following the conviction, unless the person committed such offense while employed in a child day center or the object of the offense was a minor." *Code of Virginia* §63.2-1720.
 - ▶ "A children's residential facility may hire for compensated employment or for volunteer or contractual service purposes persons who have been convicted of not more than one misdemeanor offense under § 18.2-57 or 18.2-57.2, if 10 years have elapsed following the conviction, unless the person committed such offense in the scope of his employment, volunteer, or contractual services." *Code of Virginia* §63.2-1726.

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Virginia Barrier Crime Laws Exceptions

- ▶ A licensed nursing home, home care organization or hospice “may hire an applicant who has been convicted of one misdemeanor specified in this section not involving abuse or neglect, if five years have elapsed following the conviction.” *Code of Virginia* §§32.1-126.01, 32.1-162.9:1

- ▶ A DMHMRSAS provider, CSB, or BHA “may hire for compensated employment persons who have been convicted of not more than one misdemeanor offense under § 18.2-57 or 18.2-57.2, if 10 years have elapsed following the conviction, unless the person committed the offense while employed in a direct consumer care position.” *Code of Virginia* §§37.2-416, 37.2-506, 37.2-607.

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Screening Process for Employment at Adult Substance Abuse Treatment Programs

- ▶ In addition, a screening process has been added in statute (§§37.2-506, 37.2-416) to allow CSBs, BHAs and DMHMRSAS providers to consider for employment in adult substance abuse treatment programs only, persons convicted of certain barrier crime offenses including:
 - ▶ Unlawful hazing (§18.2-56);
 - ▶ Reckless handling of a firearm (§18.2-56.1);
 - ▶ Any misdemeanor or felony violation related to:
 - ▶ reckless endangerment of others by throwing objects (§18.2-51.3);
 - ▶ threat (§18.2-60),
 - ▶ breaking and entering a dwelling house with intent to commit misdemeanor in (§18.2-92),
 - ▶ possession of burglarious tools (§18.2-94),
 - ▶ any felony violation relating to distribution of drugs, except an offense pursuant to subsections H1 or H2 of §18.2-248, or
 - ▶ An equivalent offense in another state.

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Screening Process for Employment at Adult Substance Abuse Treatment Programs (cont.)

- ▶ Eligibility for screening requires that the applicant shall:
 - ▶ Have completed all prison or jail terms;
 - ▶ Not be under probation or parole supervision;
 - ▶ Have no pending charges in any locality;
 - ▶ Have paid all fines, restitution, and court costs for any prior convictions; and
 - ▶ Have been free of parole or probation for at least 5 years for all convictions.

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Screening Process for Employment at Adult Substance Abuse Treatment Programs (cont.)

- ▶ Screening will determine:
 - ▶ (i) if the criminal behavior was substantially related to the applicant's substance abuse, and,
 - ▶ (ii) whether the applicant has been successfully rehabilitated and is not a risk to consumers based on the criminal history background and substance abuse history.

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Presentation Outline

- Rationale for Barrier Crime Laws**
- Virginia's Barrier Crime Laws**
- Federal Laws***
- Discrimination and Liability Issues**
- Transformation Initiative**
- Workgroup Discussions and Recommendations**
- Other States**
- Policy Options**

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Federal Laws

- ▶ In general, the federal government does not preclude employment by social services and health entities except in a few specific instances.
 - ▶ Persons seeking to provide foster or adoptive home care must have background checks conducted through national crime information databases and state child abuse registries as required by the Adam Walsh Act.
 - ▶ Convictions warranting mandatory exclusion:
 - ▶ Program-related crimes,
 - ▶ Patient Abuse,
 - ▶ Health Care Fraud, and
 - ▶ Controlled-substance related crimes.
 - ▶ Convictions warranting permissive exclusion:
 - ▶ Fraud or kickbacks,
 - ▶ Obstruction of investigation,
 - ▶ Misdemeanor related to controlled substance,
 - ▶ License revocation or suspension,
 - ▶ Exclusion or suspension under federal or state health program, and
 - ▶ Claims for excessive charges or unnecessary services.

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Federal Laws (Cont.)

- ▶ The National Child Protection Act (42 U.S.C. §5119a) allows states to conduct a nationwide criminal history background check for the purpose of determining whether an individual who shall have unsupervised access to children, the elderly, or individuals with disabilities has been convicted of a crime that bears upon the fitness of the individual to provide care to or have responsibility for the safety and well-being of children, the elderly, or individuals with disabilities.

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Federal Pilot Program for Background Checks

- ▶ Section 307 of the Medicare Prescription Drug, Improvement and Modernization Act of 2003 (MMA) (PL108-173) directs the Secretary of Health and Human Services (HHS), in consultation with the Attorney General, to establish procedures for conducting background checks on prospective direct patient access employees providing long term care.
- ▶ These procedures are being developed through a pilot project involving the following states:
 - ▶ Alaska, Idaho, Illinois, Michigan, Nevada, New Mexico and Wisconsin.

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Pending Federal Legislation

- ▶ Federal legislation that would establish additional background checks is being considered.
 - ▶ Patient Safety and Abuse Prevention Act of 2007 (S.1577 & H.R.3078)
 - ▶ Would amend Titles XVIII and XIX of the Social Security Act to require screening, including national criminal history background checks, of direct patient access employees of skilled nursing facilities, nursing facilities, and other long-term care facilities and providers, and to provide for nationwide expansion of the pilot program for national and State background checks on direct patient access employees of long-term care facilities or providers.

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Pending Federal Legislation (Cont.)

- ▶ Senior Safety and Dignity Act of 2007 (H.R.1476)
 - ▶ Would amend Titles XVIII and XIX of the Social Security Act to expand the nursing home patients' bill of rights to include requiring background checks on direct access employees and requiring nursing long-term care facilities to establish disaster emergency and evacuation plans.

- ▶ The enforcement provisions of each of these bills provides that any state that fails to enforce the provisions of this legislation would be excluded from participation under the Medicare and Medicaid programs.

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Presentation Outline

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Discrimination Issues

- ▶ “The widespread availability of criminal record information has made it easier for employers and licensing boards to identify and reject people with a criminal record.” Margaret Colgate Love, “Relief from the Collateral Consequences of a Criminal Conviction: A State-by-State Resource Guide.” (October 2005).
- ▶ Title VII of the Civil Rights Act of 1964 establishes parameters affecting the scope of a potential employer’s inquiries about prior arrests, convictions, and other aspects of the applicant’s criminal history.
 - ▶ Under Title VII, employers may exclude applicants with arrest or conviction records if they can prove that the applicant’s criminal history prevents the latter from satisfying certain job requirements.
 - ▶ Employers can usually defend Title VII challenges by availing themselves of the “business necessity” defense.

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Discrimination Issues (Cont.)

- ▶ 33 states have laws to limit consideration of conviction in connection with employment and/or licensing decisions, requiring that the offense be substantially or directly related to the license and/or employment sought.
- ▶ A few states allow consideration of an offender's rehabilitation, establishing a standard that, if met, precludes denial of licensure or employment.
 - ▶ In a few states rehabilitation is presumed after passage of a certain period of time.
- ▶ Some states have codified their policies of eradicating discrimination based on criminal records (CT, NJ, NY).
- ▶ Wisconsin and Hawaii have enacted fair employment laws that expressly preclude, absent an exception, employment discrimination based on a criminal record.
 - ▶ These general nondiscrimination laws do not apply to specific prohibitions under state or federal law for particular jobs or licenses that deal with vulnerable populations.

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Liability Issues

- ▶ Under the negligent hiring doctrine, "one who conducts an activity through employees is subject to liability for harm resulting from the employer's conduct if the employer is negligent in hiring an improper person in work involving an unreasonable risk of harm to others." Southeast Apartments Management, Inc. et al v. Jackman, 257 Va. 256 (1999).
- ▶ Additionally, an employer is liable for negligence for employing a person with known propensities, or propensities which should have been discovered by reasonable investigation, in a position in which it should have been foreseeable that the hired individual posed a threat to others. Southeast Apartments Management, Inc. et al v. Jackman, 257 Va. 256 (1999).

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Liability Issues (Cont.)

- ▶ Under the doctrine of respondeat superior, an employer is vicariously liable for an employees acts committed within the “scope of employment.”

- ▶ Liability under the negligent hiring doctrine allows a plaintiff to recover in circumstances where the respondeat superior, “scope of employment” limitation protects employers from liability. Interim Personnel of Central VA, Inc. v. Messer, 263 Va. 435 (2002).

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Liability Issues (Cont.)

- ▶ Enactment of a statutory employment or licensing requirement imputes a duty of care onto employers in the industry governed by the provision.
 - ▶ In some states, an employer’s failure to perform a state-mandated criminal background check is considered negligence per se in a negligent hiring case (Mahan v. Am-Guard, Inc., 2003; Mueller by Math v. Community Consolidated School District 54, 1997).
 - ▶ In Virginia, such a failure could be considered negligence per se.
 - ▶ In other states, the failure is admissible as evidence of negligence. (Connes v. Molalla Transport Sys., Inc., 1991).

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The Transformation Initiative

- ▶ Whereas the barrier crime laws for employers caring for children, the elderly and disabled are becoming more expansive and restrictive, a different movement is occurring in the mental health and substance abuse arena.
- ▶ Specifically, the President launched the New Freedom Commission on Mental Health with the purpose of transforming the mental health system by focusing on recovery and making mental health care consumer and family driven.
- ▶ Additionally, Virginia has in place its own System Transformation Initiative to transform Virginia's "services delivery system to one that truly embraces the concepts of recovery, self-determination and empowerment." "The System Transformation Initiative," available at <http://www.dmhmrsas.virginia.gov/PressReleases/admPR-Transformatio.htm>.

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Transformation Initiative

- ▶ Consumers of substance abuse services face severe shortages of core services needed for successful recovery in the community, including, affordable housing, reliable transportation, and employment assistance. “Review of Community Services Board Substance Abuse Outpatient Services for Adults”, Office of the Inspector General (Report: #129-06).
- ▶ “Many substance abuse treatment professionals enter the field having experienced significant personal problems with drug and alcohol problems or having had close family members with serious problems:
 - ▶ 27% of staff identified themselves as being in recovery from drug or alcohol addiction. 81% make this fact known to the persons they serve;
 - ▶ 64% responded that they have been significantly affected by the substance use disorder of a close family member.
 - ▶ Consumers who were interviewed often mentioned that they value working with staff members who are in recovery.” “Review of Community Services Board Substance Abuse Outpatient Services for Adults”, Office of the Inspector General (Report: #129-06).

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Transformation Initiative

- ▶ Enforcement of absolute barrier crimes with no opportunity to determine whether intervening factors (particularly those related to an individual’s substance use disorder or mental illness) should be considered contradicts the principles of a transformed mental health system.
 - ▶ The vision of the transformed system is that every person with a substance use disorder and/or mental illness can achieve some level of recovery.
 - ▶ Evidence suggests that peer support can play an important role in the recovery process.

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Workgroup

- ▶ In March 2007, JCHC staff convened a workgroup to discuss SJR 106 and the intended goal of the legislation.
- ▶ The workgroup included representatives from various stakeholders. Specifically, in attendance, were representatives from:
 - ▶ Virginia Association of Community Services Boards;
 - ▶ Alzheimer's Association of Virginia;
 - ▶ Virginia Assisted Living Association;
 - ▶ Virginia Health Care Association;
 - ▶ Virginia Association for Home Care & Hospice;
 - ▶ SAARA of Virginia;
 - ▶ DMHMRSAS, Office of Substance Abuse Services;
 - ▶ Virginia Health Care Association;
 - ▶ SAARA of Northern Virginia, President;
 - ▶ Virginia Association for Nonprofit Homes for the Aging; and,
 - ▶ Virginia Network for Private Providers.
- ▶ Staff also held meetings with representatives from the Virginia Department of Health and the Virginia Department of Social Services.

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Workgroup Discussions

- ▶ Research findings and the testimony of stakeholders revealed that persons with a history of mental illness and/or substance abuse problems often have criminal backgrounds related to their illness or substance abuse problems, and often have difficulty obtaining employment, making rehabilitation more difficult.
- ▶ Employers also have difficulty obtaining a qualified workforce.
- ▶ “The collateral consequences of conviction have grown more numerous and more disabling...and can frustrate the chances of successful offender reentry” into society. Margaret Colgate Love, “Relief from the Collateral Consequences of a Criminal Conviction: A State-by-State Resource Guide.” (October 2005).

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Workgroup Discussions

- ▶ It is difficult to determine the number of individuals in Virginia who have been denied employment because of a criminal conviction.
- ▶ From July 1, 2006- December 30, 2006, the Virginia State Police (VSP) received 16,601 requests for background checks.
 - ▶ 13,708 resulted in a no “hit” for a barrier crime.
 - ▶ 2,893 resulted in a “hit” for a barrier crime and/or qualified for assessment, but required more research for verification.
 - ▶ The VSP does not track the number of persons out of the 2,893 possible hits for barrier crimes that are actually denied employment because of a barrier crime in their background.
- ▶ Additionally, it is impossible to determine the number of qualified individuals who do not apply for positions because they do not want to undergo a background check.

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Workgroup Discussions

- ▶ Although workforce shortages affect most of the health and social service providers in Virginia, most of the workgroup participants indicated they were not interested in changing the barrier crime laws affecting their services.
- ▶ However, this was not the sentiment expressed by representatives of CSBs who suggested:
 - ▶ Removing the current barrier crimes provisions pertaining to employment in adult substance abuse treatment facilities and allowing consideration of an individual's entire criminal record.
 - ▶ Providing for a rehabilitation assessment for employment of individuals with serious mental illness similar to the assessment allowed for individuals with substance use disorder.

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Workgroup Discussions

- ▶ Virginia law (§§ 37.2-416, 37.2-506, 37.2-608) allows individuals with substance use disorder, with certain barrier crimes on their record, be assessed for rehabilitation and therefore become eligible to work in direct care within an adult substance use program.
- ▶ There is no similar provision in Virginia law to allow individuals with mental illness and certain barrier crimes to qualify for rehabilitation assessment.
 - ▶ Consumers with serious mental illness may have assaults in their background making them ineligible to be employed as peer counselors. Often, these such assaults involve a family member or a law enforcement officer during the ECO/TDO process.
- ▶ Many consumers with serious mental illness could benefit from peer contact, similar to the benefits enjoyed by consumers with substance use disorder.
- ▶ The CSBs estimate that over 40 mental health consumers would qualify for employment if they could be assessed for rehabilitation in the same manner as allowed for substance use disorder.

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Presentation Outline

- Rationale for Barrier Crime Laws**
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- Policy Options**

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Other States

- ▶ States differ in the degree and manner in which they mandate employment restrictions based on the criminal record of the applicants in social service and health care fields.
 - ▶ For example, the majority of states require background checks for licensing/employment purposes, but not all of those states list the barrier crimes in Code.
 - ▶ If not listed in the Code, barrier crimes might be listed in the Administrative Rules and Regulations of the state, or no specific barrier crimes exist and the hiring decision is at the discretion of the employing/licensing entity.
 - ▶ The types of barrier crimes also vary across the states from the generalized, "all felonies," to the specific, violent crimes.
 - ▶ Additionally, the entities with barrier crime restrictions also vary across the states; some states limit barrier crimes to entities that deal with children while others have barrier crimes for all entities that deal with vulnerable populations.

- ▶ Since this presentation is narrow in focus, the following slides will contain examples of how other states screen and assess persons with a criminal background for employment in the health and social services fields. (State-specific information can be provided at request, and will be included in the written report).

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Levels of Barrier Crimes

- ▶ Alaska is an example of a state that provides levels of barrier crimes for employment in an area serving a vulnerable population.
 - ▶ Depending on the level of crime, the regulations specify 1, 3, 5 and 10 year periods of ineligibility, as well as permanent ineligibility.
 - ▶ The most violent crimes are permanent barriers to employment.
 - ▶ 2 or more felonies of any type is also a permanent barrier to employment.
 - ▶ A misdemeanor for domestic violence constitutes a barrier crime for 1 year.

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Assessment of Eligibility

- ▶ Colorado is an example of a state that allows assessment of a disqualification of eligibility for employment.
 - ▶ Assessment is only allowed for certain misdemeanors, and only after a certain period of time has elapsed.
- ▶ Florida provides levels of screening based on the type of employment sought.
 - ▶ Allows exemptions from disqualification.
 - ▶ Felonies and misdemeanors can be exempted after a certain amount of time has elapsed.
 - ▶ Granted after weighing the mitigating circumstances.

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Assessment for Eligibility

- ▶ Illinois and New Jersey are examples of states that list the barrier crimes in Code; however, allow an individual to request a waiver/reconsideration for any crime.
 - ▶ Granted after an evaluation of the evidence and the mitigating circumstances.
 - ▶ In New Jersey, the individual must affirmatively demonstrate rehabilitation.

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Policy Options

- ▶ **Option 1:** Take no action.
- ▶ **Option 2:** Introduce legislation to remove the barrier crime provisions from *Code of Virginia* §§37.2-506, 37.2-416 and allow CSBs, BHAs and DMHMRSAS to consider the entire criminal background record, along with all other relevant information, when hiring persons in direct consumer care positions in adult mental health and/or substance abuse programs. This would have the effect of removing all barrier crimes placing the full responsibility for making the hiring decision on the employing entity.

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Policy Options

- ▶ **Option 3:** Introduce legislation to amend the *Code of Virginia* §§37.2-506, 37.2-416 to allow for a rehabilitation assessment for any applicant who has been convicted of a barrier crime, unless the offense was intentional violent harm against an adult or child, to work in adult substance abuse or adult mental health treatment programs.

- ▶ **Option 4:** Introduce legislation to amend *Code of Virginia* §§37.2-506, 37.2-416 to provide a screening option for consumers with serious mental illness to be assessed for employment in adult mental health and/or adult substance abuse treatment centers.

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Public Comments

- ▶ Written public comments on the proposed options may be submitted to JCHC by close of business on November 5, 2007. However, to ensure comments are included in the preliminary draft that will be sent to JCHC members, comments must be received by close of business November 1, 2007. Comments may be submitted via:
 - ▶ E-mail (sareid@leg.state.va.us)
 - ▶ Facsimile (804/786-5538) or
 - ▶ Mail to Joint Commission on Health Care
P.O. Box 1322
Richmond, Virginia 23218

- ▶ Comments will be summarized and presented to JCHC during its November 8th meeting.

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Appendix A
2006 SESSION

ENROLLED

SENATE JOINT RESOLUTION NO. 106

Directing the Joint Commission on Health Care to study the impact of barrier crimes laws on social service and health care employers, prospective employees, consumers, residents, patients, and clients. Report.

Agreed to by the Senate, March 8, 2006

Agreed to by the House of Delegates, March 6, 2006

WHEREAS, many employers are required by law to do a criminal background check of any person who is to be hired for compensated employment; and

WHEREAS, these employers are providers of services to senior citizens, children, and people with mental disabilities; and

WHEREAS, these employers also are prohibited by law from hiring persons who have been convicted of certain crimes; and

WHEREAS, the laws related to criminal background checks and barrier crimes were designed to protect those who are least able to protect themselves; and

WHEREAS, the General Assembly has recognized that some people with addictions are convicted of crimes that are related to their addictions and, absent the addiction, these people would not have engaged in any criminal behavior; and

WHEREAS, the General Assembly has carved out some exceptions to the barrier crimes laws for people who were convicted of crimes related to their addiction so they can work in adult substance abuse treatment programs; and

WHEREAS, employers in service delivery agencies impacted by the barrier crimes laws often have difficulty finding qualified applicants and employees with the appropriate skills; and

WHEREAS, potential applicants who have been convicted of crimes know that they cannot be hired for certain positions and, therefore, do not even apply; and

WHEREAS, prior to passage of the barrier crimes laws, most of these employers were checking the state criminal convictions database and refusing to hire people who had certain criminal convictions in their history; and

WHEREAS, these barrier crimes laws allowed employers the necessary ability to receive results from the Central Criminal Records Exchange (CCRE) based on the understanding that federal law prohibited dissemination of specific criminal records to nongovernmental entities; and

WHEREAS, it is clear now that federal law does not prohibit access to the CCRE results by nongovernmental entities; and

WHEREAS, a bar to employment and the resultant report on the applicant's criminal background does not give the employer a complete picture of the applicant's criminal record and prevents the employer from screening based on convictions other than those that are a statutory bar; and

WHEREAS, the employer has a legal duty to protect its consumers, residents, patients, and clients from injury caused by employees who the employer knew or should have known posed a risk of harm to others; and

WHEREAS, this civil liability provides great incentive for an employer not to hire a person with a criminal background, except in very unusual circumstances that demonstrate that, despite the criminal conviction, the prospective employee is not at all likely to re-offend; and

WHEREAS, it is not certain that the creation of barrier crimes laws provides more protection to children, the elderly, or people with mental disabilities than the employer's concerns with his legal duty to protect his consumers, residents, patients, and clients; now, therefore, be it

RESOLVED by the Senate, the House of Delegates concurring, That the Joint Commission on Health Care be directed to study the impact of barrier crimes laws on social service and health care employers, prospective employees, consumers, residents, patients, and clients.

In conducting the study, the Joint Commission on Health Care shall, with regard to the barrier crimes laws: (i) determine their effectiveness in protecting consumers, residents, patients, and clients; (ii) examine the difficulty experienced by employers in service delivery agencies in finding qualified applicants and employees, as well as the difficulty experienced by prospective employees in finding jobs; (iii) compare Virginia's barrier crimes laws with laws related to criminal convictions and employment in other states; and (iv) gather data on employment discrimination based on an individual's criminal conviction record from state agencies, institutions, boards, bureaus, commissions, councils, or any instrumentality of the Commonwealth. The Joint Commission on Health Care shall consider comments from affected entities, including representatives of long-term care providers and advocacy groups, and the Virginia Association of Community Services Boards; the Substance Abuse and Addiction Recovery Alliance; the Consortium of Substance Abuse Organizations; the Virginia Association of Drug and Alcohol Programs; the Virginia Association of Alcoholism and Drug Abuse Counselors; the Department of Mental Health, Mental Retardation and Substance Abuse Services; the Department for the Aging; and the Department of Rehabilitative Services.

All agencies of the Commonwealth shall provide assistance to the Joint Commission on Health Care for this study, upon request.

The Joint Commission on Health Care shall complete its meetings for the first year by November 30, 2006, and for the second year by November 30, 2007, and shall apprise the Virginia State Crime Commission of its findings and recommendations each year, and the chairman shall submit to the Division of Legislative Automated Systems an executive summary of its findings and recommendations no later than the first day of the next Regular Session of the General Assembly for each year. Each executive summary shall state whether the Joint Commission on Health Care intends to submit to the General Assembly and the Governor a report of its findings and recommendations for publication as a House or Senate document. The executive summaries and reports shall be submitted as provided in the procedures of the Division of Legislative Automated Systems for the processing of legislative documents and reports and shall be posted on the General Assembly's website.



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