

REPORT OF THE

**JOINT SUBCOMMITTEE TO STUDY
BARRIER CRIMES AND CRIMINAL
HISTORY RECORDS CHECKS IN
THE COMMONWEALTH IN THE
21ST CENTURY (SJR 285, 2021 SSI)**

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



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**COMMONWEALTH OF VIRGINIA
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Joint Subcommittee to Study Barrier Crimes and Criminal History Records Checks

Executive Summary of 2021 Interim Activity

<https://studies.viriniageneralassembly.gov/studies/546>

The Joint Subcommittee to Study Barrier Crimes and Criminal History Records Checks (the Joint Subcommittee) was established pursuant to SJ 35 (Edwards, 2020 Regular Session) and continued through SJ 285 (Edwards, 2021 Special Session I). SJ 285 directs the Joint Subcommittee to complete its meetings by November 30, 2021, and submit an executive summary of the Joint Subcommittee's findings and recommendations no later than the first day of the 2022 Regular Session of the General Assembly. The resolution also limits the Joint Subcommittee to no more than four meetings during the 2021 interim.

The Joint Subcommittee met four times during the 2021 interim to prepare for the 2022 Session.

Meeting 1 — June 14, 2021

The Joint Subcommittee met electronically with Senator John S. Edwards, chair, presiding. In addition to Senator Edwards, the members present were Delegate Marcia S. Price (vice-chair); Delegate Lamont Bagby; Delegate Michael P. Mullin; James Abrenio; Gena Boyle Berger, designee of the Commissioner of Social Services; Kristi Kelly; Alison G. Land; and M. Norman Oliver. Senator Scott A. Surovell and Delegate Ibraheem S. Samirah were absent.

Each of the presenters was tasked with providing answers and information for the following:

1. What should and should not be a barrier crime?
2. Whether there should be a time limit following conviction when a crime is no longer a barrier crime, and, if so, what such time limit should be;
3. Whether there should be an exception, waiver, or appeals process, and, if so, what such process should be;
4. Demographic data on individuals for whom a criminal history records check is completed and for whom a criminal conviction is a barrier to employment, licensure, etc.;
5. Recidivism rates of barrier crimes;
6. Information on what has been done in other states regarding barrier crimes and criminal history records checks; and
7. Whether there should be tiered levels of barrier crimes and, if so, how to include such tiered levels in the Code of Virginia.

Presentation: Department of Social Services

Ms. Berger, Chief Deputy Commissioner of the Department of Social Services (DSS), explained that because DSS has to comply with both federal and state law, it is uniquely situated to assess

how barrier crimes affect placing children with foster or adoptive parents. She emphasized that Virginia's list of barrier crimes is far more restrictive than its federal counterpart, primarily because it includes misdemeanors while the federal list includes only felonies. The practical impact of Virginia's list is that many children who need foster or adoptive placement are not able to be placed with willing and able relatives and fictive kin, which, when possible, is generally a more desirable placement option. Ms. Berger added that while Virginia law does allow for some exceptions, federal law allows for waiver authority for employment at child care centers and for relatives or fictive kin to become foster parents. She suggested that the Code of Virginia should be expanded to include this same waiver authority.

Presentation: Department of Behavioral Health and Developmental Services

Stacy Pendleton, Chief Human Resources Officer of the Department of Behavioral Health and Developmental Services (DBHDS), pointed out that, unlike DSS, DBHDS is beholden only to state law. Ms. Pendleton explained that restrictions related to drug-related crimes and misdemeanors are the most impactful for DBHDS employees and clients, especially considering that people with lived mental health or substance abuse challenges are uniquely qualified to counsel those experiencing the same challenges. Currently, the Code of Virginia allows for employment with DBHDS after a certain time period for specific crimes has elapsed, but there is a very limited internal screening process for certain crimes related to substance abuse or mental health. Importantly, Ms. Pendleton noted, the largest barrier to employment with DBHDS is misdemeanor assault and battery (not of a family member), especially in the case of those with more than one conviction for the crime. The second biggest barrier to employment with DBHDS is distribution of a controlled substance. More data related to specific crimes can be found on the DBHDS slides included in this meeting's materials on the Joint Subcommittee's webpage.

Presentation: Department of Health

Rebekah Allen, Senior Policy Analyst with the Virginia Department of Health (VDH), noted that, unlike DSS and DBHDS, drug-related offenses are not a bar to licensure for employment at medical care facilities. Currently, the only time limit on barrier crimes for employment as it relates to VDH is after five years have elapsed following conviction of a single misdemeanor not involving abuse or neglect. She added that VDH has no discretion in waivers or exceptions, so an individual is either barred or not. Ms. Allen noted that other states set time limits by category or severity of the crime but also include some flexibility to waive some or all of these time limits. She added that the lack of discretion in Virginia results in providers being unable to meet workforce demands, especially in rural areas. Ms. Allen suggested three options for creating tiers of barrier crimes, as highlighted in a 2012 Centers for Medicare and Medicaid Services report:

- Option 1: a three-tier system based on the severity of the crime, with time limits on each tier, and a variance/waiver process at any time with consideration of rehabilitation factors;
- Option 2: general categories of disqualifying convictions, with minimum time limits for each category, and a variance/waiver process after the minimum time has elapsed with consideration of rehabilitation factors; or
- Option 3: a consolidated option combining the general categories of disqualifying convictions with a variance/waiver process at any time.



Public Comment and Discussion

The Joint Subcommittee members heard public comment and had a short discussion regarding next steps. They agreed that, to the extent possible, the barrier crimes requirements, exceptions, waivers, and appeals processes should be consolidated into one section of the Code of Virginia to avoid confusion. Senator Edwards also noted that another avenue to explore is for the DSS provisions to only include the federal list of barrier crimes.

Meeting 2 — August 16, 2021

The Joint Subcommittee met electronically with Senator Edwards presiding. In addition to Senator Edwards, the members present were Delegate Price; Senator Surovell; Delegate Bagby; Delegate Samirah; Mr. Abrenio; Ms. Allen, designee of Commissioner Oliver; Ms. Berger; Ms. Kelly; and Commissioner Land. Delegate Mullin was absent.

Presentation: Overview of Barrier Crimes Provisions Currently in the Code of Virginia

Anna Moir, Attorney with the Division of Legislative Services, gave an overview of § 19.2-392.02, which provides the comprehensive list of barrier crimes. She explained that this "home base" section of the Code of Virginia sets out the list of barrier crimes in subsection A as follows:

- (i) Crimes against a person, property crimes, crimes involving health and safety, or crimes involving morals and decency, peace and order, and administration of justice;
- (ii) Specific property crimes;
- (iii) Specific drug crimes;
- (iv) Felony violations of possession of controlled substances;
- (v) Offenses that result in the person's requirement to register with the Sex Offender and Crimes Against Minors Registry; and
- (vi) Any other felony not included in the above clauses unless five years have elapsed from the date of conviction.

She then explained how VDH, DBHDS, DSS, and the Department of Education (DOE) interact with these barrier crimes provisions. Specifically, Ms. Moir reviewed with the Joint Subcommittee (a) which individuals are subject to barrier crimes; (b) what offenses constitute a barrier crime; and (c) what, if any, exceptions there are within each agency's respective title of the Code of Virginia. The specific Code of Virginia sections and impacted entities can be found in this meeting's materials on the Joint Subcommittee's webpage.

Presentation: Drafting Options

Based on discussions from previous meetings of the Joint Subcommittee, Ms. Moir presented three drafting options to the members. The first drafting option is to amend § 19.2-392.02 to eliminate some or all misdemeanor crimes from the barrier crimes list and include agency-specific waiver processes for felony offenses. The second drafting option is to keep the current list of barrier crimes intact and allow agency-specific waiver processes for all or most of the enumerated crimes. Options one and two could also include eliminating references to Virginia barrier crimes and including only references to the applicable federal rules in the Code of Virginia sections that govern foster and adoptive care.



The third drafting option is to consolidate all barrier crimes provisions into one section. Ms. Moir noted that although this option was discussed during the previous meeting of the Joint Subcommittee, a better option would be to amend an existing section or create an entirely new section that sets out a single list of barrier crimes, agency-specific requirements, exclusions of certain crimes, and waiver processes in each individual title that governs each agency.

Since the three options presented were a non-exhaustive list of what could be done, Ms. Moir also provided the members with a few additional line items, including creating a tiered system based on crime severity.

Public Comment, Discussion, and Directions to Staff

After hearing public comment, the members of the Joint Subcommittee discussed the various drafting options presented. They agreed that, at the very least, some misdemeanors could be eliminated from the barrier crimes list. Additionally, there was a general consensus that a waiver process specific to the individual agencies would probably be the best way to move forward.

Staff was directed to first get feedback from VDH, DBHDS, DSS, and DOE about which crimes should be removed from the barrier crimes list, as well as what they would want a waiver process to entail. Staff will prepare a draft for the next meeting, keeping in mind any subsequent feedback. No date and time were set for the next meeting.

Meeting 3 — October 6, 2021

The Joint Subcommittee met electronically with Senator Edwards presiding. In addition to Senator Edwards, the members present were Delegate Price; Senator Surovell; Delegate Bagby; Delegate Mullin; Mr. Abrenio; Ms. Allen; Nikki Callahan, designee of S. Duke Storen; Ms. Kelly; and Ms. Pendleton, designee of Commissioner Land. Delegate Samirah was absent.

Presentation: First Draft of Legislation for Introduction for the 2022 Session

Ms. Moir and Sabrina Miller-Bryson, Attorney with the Division of Legislative Services, gave an overview of the first draft of legislation to reform the barrier crimes provisions in the Code of Virginia. The purpose of providing this first draft for the meeting was to gather feedback from the Joint Subcommittee members and members of the public to ensure that the draft is well vetted prior to the final meeting in November. The five main elements of the draft are:

- Creates a new subsection H in § 19.2-392.02 that directs DBHDS, DOE, VDH, and DSS to set out waiver processes whereby individuals may apply for employment despite convictions of barrier crimes;
- Creates a new subsection I in § 19.2-392.02 that provides a penalty for a business screening service or qualified entity that discharges or discriminates against an individual for any reason concerning solely the barrier crime conviction that was subject to a waiver;
- Eliminates some barrier crimes from the list in § 19.2-392.02;
- Adds references in Code of Virginia sections in the respective titles of the agencies to the new provisions in § 19.2-392.02 for clarity and consistency; and
- For foster and adoptive parents, limits crimes that are barriers to compliance with federal law only.



Public Comment and Discussion

After hearing public comment, the members of the Joint Subcommittee discussed the draft and directed the attorneys to make the following changes in the updated draft for the final meeting:

- Amend the legislation to require the Boards of Behavioral Health and Developmental Services, Education, Health, and Social Services to establish their waiver processes in regulations;
- Amend subsection I of the legislation and determine a corresponding delayed effective date for the legislation;
- Reach out to stakeholders to get recommendations of crimes to eliminate from the list of barrier crimes;
- Look into Virginia Freedom of Information Act provisions to ensure that sensitive material on an individual's application is protected while also ensuring that the state agencies overseeing the waiver process can access information needed to make a determination for granting a waiver;
- Add more minimum standards around the waiver process, such as requiring each agency to provide criteria used to review an individual's waiver; and
- Other suggestions that will be explored and incorporated into the final draft.

Meeting 4 — November 8, 2021

The Joint Subcommittee met in Richmond with Senator Edwards presiding. In addition to Senator Edwards, the members present were Delegate Price, Senator Surovell, Delegate Bagby, Delegate Samirah, Mr. Abrenio, Ms. Allen, Ms. Berger, Ms. Kelly, and Commissioner Land. Delegate Mullin was absent.

Presentation: Updates to the Draft of the Barrier Crimes Legislation

Ms. Moir and Ms. Miller-Bryson went over the changes made to the draft barrier crimes legislation since the last meeting of the Joint Subcommittee on October 6, 2021. Based on the feedback from the members of the Joint Subcommittee and relevant stakeholders, the draft presented reflected the following changes:

- Removes misdemeanor assault and battery from the list of barrier crimes as set out in § 19.2-392.02;
- Requires that the Boards of Behavioral Health and Developmental Services, Education, Health, and Social Services establish the waiver process in each of their respective department's regulations and adds a subsequent appeals process;
- Adds minimum standards to the waiver process, including that waivers shall not be transferrable across DBHDS, DOE, VDH, and DSS;
- Provides remedies for unlawful dissemination of barrier crimes information by business screening services and unlawful discrimination by qualified entities;
- Exempts a barrier crime waiver application, except for a cover sheet and the status of the waiver, from the Virginia Freedom of Information Act;



- Provides a delayed effective date of July 1, 2025, except for the provisions relating to foster and adoptive parents;
- Provides job protection for employees who have been convicted of a barrier crime who are currently employed pursuant to one of the barrier crimes exceptions currently set out in the Code of Virginia;
- Allows for a phased implementation of the waiver process so as not to overwhelm DBHDS, DOE, VDH, and DSS; and
- Directs the Department of State Police to implement any necessary updates to its Criminal History and Rap Back Information System to ensure an individual's criminal history reflects when a barrier crime waiver has been granted.

Public Comment and Formal Recommendations

The members of the Joint Subcommittee heard public comment, then further discussed the draft legislation. As a result of the discussion, the members adopted the following three amendments in concept by voice vote:

- To add that an individual whose waiver application or appeal has been denied may reapply for a waiver upon a showing of a material change in circumstances;
- To add language that provides individuals currently employed with DBHDS, DOE, VDH, or DSS and subject to a current exception for a barrier crime conviction with the same protection against unlawful discrimination due to a barrier crime conviction; and
- To amend the delayed effective date to align with the effective date as provided in SB 1339 (Surovell, 2021 Special Session I).

The members also voted to include with the draft legislation a budget recommendation to the Governor. Delegate Price then moved and Delegate Bagby seconded that the Joint Subcommittee recommend that the draft legislation be introduced during the 2022 Session of the General Assembly. The Joint Subcommittee voted unanimously in favor of the motion, and the meeting was concluded.

For more information, see the [*Joint Subcommittee's webpage*](#) or contact the Division of Legislative Services staff:

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