

INTERIM REPORT OF THE

**JOINT SUBCOMMITTEE TO STUDY
BARRIER CRIMES AND CRIMINAL
HISTORY RECORDS CHECKS IN
THE COMMONWEALTH IN THE
21ST CENTURY (SJR 35, 2020)**

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



SENATE DOCUMENT NO. 5

**COMMONWEALTH OF VIRGINIA
RICHMOND
2021**

Joint Subcommittee Members

General Assembly Members

The Honorable John S. Edwards, Chair
The Honorable Marcia S. (Cia) Price, Vice-Chair
The Honorable Lamont Bagby
The Honorable Michael P. Mullin
The Honorable Ibraheem S. Samirah
The Honorable Scott A. Surovell

Citizen Members

James Abrendio
Kristi Kelli

Ex Officio Members

Alison G. Land
M. Norman Oliver
S. Duke Storen

Staff

Anna Moir, Attorney
Sabrina Miller-Bryson, Attorney
Britt Olwine, Attorney

EXECUTIVE SUMMARY

At the 2020 Regular Session of the General Assembly, the Joint Subcommittee to Study Barrier Crimes and Criminal History Records Checks in the Commonwealth in the 21st Century was established pursuant to Senate Joint Resolution 35. The 11-member Joint Subcommittee was directed to study the Commonwealth's requirements related to barrier crimes and criminal history records checks, and in conducting its study, develop recommendations related to (i) whether statutory provisions related to criminal history records checks, barrier crimes, and barrier crime exceptions should be reorganized and consolidated into a central location in the Code of Virginia; (ii) whether certain crimes should be removed from the list of barrier crimes; (iii) whether barrier crime exceptions and waiver processes should be broadened; (iv) whether the required amount of time that must lapse after conviction of certain barrier crimes should be shortened; and (v) other changes that could be made to criminal history records check and barrier crimes requirements that would improve the organization, effectiveness, and fairness of such provisions.

The Joint Subcommittee was originally scheduled to complete its meetings by November 30, 2020, and submit to the Division of Legislative Automated Systems an executive summary of its findings and recommendations no later than the first day of the 2021 Regular Session of the General Assembly. In the 2021 Regular Session, the work of the Joint Subcommittee was continued for one year pursuant to Senate Joint Resolution 285, with the Joint Subcommittee now scheduled to submit an executive summary of its findings and recommendations no later than the first day of the 2022 Regular Session of the General Assembly.

Senator John S. Edwards and Delegate Marcia S. (Cia) Price serve as the Joint Subcommittee's chair and vice-chair, respectively. The Joint Subcommittee held two meetings during the 2020 interim and began its evaluation of the background and history of barrier crimes in the Commonwealth and current laws pertaining to barrier crimes in the Commonwealth. The Joint Subcommittee heard presentations from state agencies and stakeholders providing overviews of current barrier crimes and regulations. The Joint Subcommittee directed the Department of Health, the Department of Behavioral Health and Developmental Services, and the Department of Social Services to look into questions posed by the Joint Subcommittee and respond to such questions by April 1, 2021.

**INTERIM REPORT OF
THE JOINT SUBCOMMITTEE TO STUDY
BARRIER CRIMES AND CRIMINAL HISTORY RECORDS CHECKS
IN THE COMMONWEALTH
IN THE 21ST CENTURY
TO
THE GOVERNOR AND THE GENERAL ASSEMBLY OF VIRGINIA
RICHMOND, VIRGINIA
2021**

To: Governor of Virginia
and
The General Assembly of Virginia

I. Meeting Summary for October 19, 2020

The Joint Subcommittee to Study Barrier Crimes and Criminal History Records Checks in the Commonwealth in the 21st Century (the Joint Subcommittee) met electronically with Senator John S. Edwards, chair, presiding.¹ The meeting began with introductions and opening remarks followed by presentations and discussion. Materials presented at the meeting are accessible through the [*Joint Subcommittee's website*](#).

Presentation: General Overview of SJR 35 and Joint Subcommittee to Study Barrier Crimes and Criminal History Records Checks

Anna Moir, Staff Attorney, Division of Legislative Services

Ms. Moir discussed the history of barrier crimes legislation by summarizing SB 1243 (Edwards, 2011), SB 97 (Edwards, 2013), SB 868 (Edwards, 2013), SJR 311 (Edwards, 2013), SB 353 (Edwards, 2014), and SB 1008 (Hanger, 2017).

She also presented an overview of SJR 35 (Edwards, 2020) and explained that it directed the Joint Subcommittee to develop recommendations related to (i) whether statutory provisions related to criminal history records checks, barrier crimes, and barrier crime exceptions should be reorganized and consolidated within the Code of Virginia; (ii) whether certain crimes should be removed from the list of barrier crimes; (iii) whether barrier crime exceptions and waiver processes should be broadened; (iv) whether the required amount of time that must lapse after conviction of certain barrier crimes should be shortened; and (v) other changes that could be made to criminal history records checks and barrier crimes requirements that would improve the organization, effectiveness, and fairness of such provisions.

¹**Members Present:** Senator John S. Edwards (chair), Delegate Marcia S. Price (vice-chair), Senator Scott A. Surovell, Delegate Lamont Bagby, Delegate Michael P. Mullin, Delegate Ibraheem S. Samirah, James Abrenio, Kristi Kelly, Stacey Pendleton, designee of Commissioner of Department of Behavioral Health and Developmental Services

Members Absent: M. Norman Oliver, S. Duke Storen

Presentation: Barrier Crimes and Criminal History Records Checks – Background and History of the Issue

Sabrina Miller-Bryson, Staff Attorney, Division of Legislative Services

Ms. Miller-Bryson presented the history of the issue of barrier crimes and criminal history records checks and specifically compared SB 353 (Edwards, 2014) and SB 1008 (Hanger, 2017).

She explained that SB 353 (Edwards, 2014), which was introduced in the 2014 Regular Session of the General Assembly and ultimately left in the House Committee for Courts of Justice, amended several sections of the Code of Virginia and enumerated specific barrier crimes for the following:

1. Individuals seeking employment at nursing homes, home care organizations, hospices, state facilities, other private providers licensed by the Department of Behavioral Health and Developmental Services, community services boards, behavioral health authorities, assisted living facilities, adult day care centers, children's welfare agencies, family day homes approved by family day systems, or children's residential facilities;
2. Applicants for licensure, registration, or approval as assisted living facilities, child welfare agencies, or family day homes approved by family day systems;
3. Individuals with whom a local board of social services or child-placing agency is considering placing a child on an emergency, temporary, or permanent basis;
4. Foster and adoptive homes seeking approval from child-placing agencies; and
5. Providers of adult services and adult foster care seeking approval by the Department of Social Services.

In summarizing the differences between SB 353 (Edwards, 2014) and SB 1008 (Hanger, 2017), Ms. Miller-Bryson noted that SB 1008 (Hanger, 2017) was introduced during the 2017 Session of the General Assembly, passed both chambers, was signed by the Governor on April 5, 2017, after the General Assembly approved his recommended amendments, and became effective on July 1, 2017. She said that the bill amended § 19.2-392.02 to become the comprehensive list of barrier crimes in the Code of Virginia for the individuals and entities included in the previous numbered list. The bill removed the individual lists of crimes from several sections of the Code of Virginia, some of which also were proposed for amendment or repeal in SB 353 (Edwards, 2014), and it amended them to refer instead to the comprehensive list in § 19.2-392.02. Ms. Miller-Bryson also discussed the additional crimes that constitute a barrier that were included in SB 1008 (Hanger, 2017), as well as the few exceptions.

Discussion

The members discussed the issues to be included in the Joint Subcommittee's work plan and agreed upon the following:

Drafting

- Simplify the language surrounding barrier crimes in the Code of Virginia.
- Study how other states have consolidated language in their codes, perhaps looking specifically to North Carolina as a model.

Private Background Check Companies and Related Issues

- Study possible protections or remedies in the event that a private background check company provides inaccurate information.
- Conduct a review to ensure that data brokers comply with the Fair Credit Reporting Act (FCRA). The members specifically noted concerns about data brokers who fail to comply with the FCRA and subsequently give bad information to consumer reporting agencies, and they indicated a desire to regulate the information that is passed between the brokers and agencies. Kristi Kelly pointed out that some states have started contracting with these brokers.
- Study California and Vermont laws regarding restrictions on dissemination of information relating to criminal history records checks, as well as any relief these laws provide. Senator Scott A. Surovell noted that his bill introduced in 2020, SB 641, should be included in the study of possible remedies.

Collateral Consequences

Senator Surovell suggested establishing a state database in which an individual can look up a certain Code of Virginia section and be provided with information relating to the consequences of a particular conviction. This would include barrier crime information and collateral consequences.

Expungement

As the Virginia State Crime Commission (the Crime Commission) is currently working on the issue of expungement, the Joint Subcommittee decided to align its timeline with the Crime Commission's and work in conjunction with it on the issue of expungement.

Consequences and Transparency

Individuals must be notified in court of the penalties related to barrier crimes and the collateral consequences of a conviction. This would include any barriers on the ability to foster or adopt children.

Appeals Process

Senator Edwards mentioned looking into the possibility of any appeals taking place under affected departments, such as the Department of Health and the Department of Social Services.

Work Plan

Ms. Moir told the Joint Subcommittee that Division of Legislative Services staff would put together the work plan based on the matters discussed and that both the work plan and a resolution to continue the study would be ready by the next meeting on a date and time to be announced.

The meeting adjourned at approximately 4:15 p.m.

II. Meeting Summary for November 17, 2020

The Interim Report of the Joint Subcommittee to Study Barrier Crimes and Criminal History Records Checks in the Commonwealth in the 21st Century (SJR 35, 2020) in the Commonwealth

in the 21st Century (the Joint Subcommittee) met electronically with Senator John S. Edwards, chair, presiding.² The meeting began with introductions and opening remarks followed by presentations and discussion. Materials presented at the meeting are accessible through the [Joint Subcommittee's website](#).

Presentation: Department of Social Services

Gena Berger, Chief Deputy Commissioner, Department of Social Services

Ms. Berger began her presentation with an overview of barrier crimes, including the definition as found in the Code of Virginia and what types of employment or services are impacted. She explained that care models have evolved to promote peer support services due to a rising recognition of the history of racial inequities related to barrier crimes. She noted that some states have revised their barrier crime statutes to include fewer crimes or fewer positions impacted.

Ms. Berger summarized the background check process used by the Department of Social Services (Social Services). Social Services first takes an individual's fingerprints via the Office of Background Investigations (OBI). The fingerprints are then submitted to the Virginia Department of State Police and the Federal Bureau of Investigation. OBI then screens the fingerprints, determines if there is a barrier crime and provides notice to Social Services licensed and regulated providers, as well as the Department of Behavioral Health and Developmental Services (DBHDS). Ms. Berger then listed some common crimes resulting in ineligibility and exceptions to ineligibility.

She concluded by pointing out that because a barrier crime conviction generally constitutes a lifetime prohibition, service providers have a difficult time finding qualifying employees and contributes to a shortage in qualifying foster parents. Additionally, she noted that barrier crimes prevent employment in other job sectors, affecting noncustodial parents who are required to pay child support, and results in a custodial parent filing for other assistance or benefits such as SNAP or TANF.

Presentation: Department of Behavioral Health and Developmental Services

Stacy Pendleton, Chief Human Resources Officer, Department of Behavioral Health and Developmental Services

Ms. Pendleton discussed various sections of the Code of Virginia that determine how DBHDS applies the bar on employment or volunteer services due to a barrier crime conviction. She said that specific positions within DBHDS require criminal history records checks, and that there is a discretionary screening process for 26 of the 176 statutory barrier crimes. The screening process is an assessment to determine if an offense is substantially related to mental illness or substance abuse. If an employer chooses to implement the screening process, an individual must meet the following requirements: (1) five or more years must have elapsed since the conviction; (2) the offense must have been related to substance abuse or mental illness; (3) the individual must have completed all jail or prison requirements; (4) the individual cannot be on probation or parole; and (5) all court costs must be paid. Ms. Pendleton noted that these "screenable" barrier crimes apply

² Members Present: Senator John S. Edwards (chair), Delegate Marcia S. Price (vice-chair), Senator Scott A. Surrovell, Delegate Lamont Bagby, Delegate Michael P. Mullin, James Abrenio, Kristi Kelly, Gena Boyle, designee of Commissioner of the Department of Social Services, Alison G. Land
Members Absent: Delegate Ibraheem S. Samirah, M. Norman Oliver

to both DBHDS facilities and licensed providers, but the exception itself applies only to adult mental health and substance abuse programs.

Ms. Pendleton said that DBHDS has a background investigations unit (BIU) to run criminal history records checks. The BIU is responsible for overseeing the screening process for screenable barrier crimes. Ms. Pendleton noted that barrier crimes affect the recruitment of qualified applicants because some convictions are decades old but follows an applicant. She added that many of these applicants are, in fact, qualified aside from their prior convictions, and could provide valuable services due to their lived experience.

Presentation: Department of Health

Rebekah Allen, Senior Policy Analyst, Department of Health

Ms. Allen began her presentation with an overview of those barrier crimes that most significantly impact Department of Health licensure and certification. The licensees that are most impacted include nursing homes, homecare organizations, and hospices. She noted that the only exception to the bar on hiring or licensure is for a conviction of a single barrier crime, that is punishable as a misdemeanor, that did not involve any type of abuse or neglect, and that five years or more have elapsed since the conviction. She added that hospitals are not subject to the same bar as the organizations mentioned above.

Ms. Allen then went over the criminal history records check process for new licensees. She said that the new entity seeking licensure submits a form to the Virginia State Police, and the State Police then conduct the background check. Once the entity has received a license from the Department of Health, the entity will interface directly with the State Police to perform criminal history records checks on all new hires or volunteers, and the criminal history records check must be performed within 30 days of employment. Ms. Allen noted that there are common issues and deficient practices with this process, including not conducting the criminal history records check within 30 days of employment, and having employees with a barrier crime conviction on their records.

Ms. Allen concluded her presentation by going over some of the major issues the Department of Health faces when it comes to barrier crimes and some possible solutions. One main roadblock is that in many rural areas, the caregiver pool is quite limited, so sometimes licensees knowingly hire a person with a barrier crime. She said that a solution to this would be some sort of waiver in this type of situation. She also stated that the need for plain statutory language about exceptions would be beneficial, and that she would like to see a reconsideration of the time limit on crimes that do not involve abuse or neglect.

Presentation: Aging Services, Home Care, and Hospice

Dana Parsons, LeadingAge Virginia

Ms. Parsons stated that, on a practical level, the criminal history records check process is difficult. She noted that an employer cannot go over and above with a federal criminal records check, so to accomplish this, an entity must obtain another service provider. She added that when the State Police conduct a check on a potential employee, the result is either (1) the criminal history records check comes back all clear or (2) there could be something on the report that they have to investigate further, which generally takes up to 10 days. She said that the biggest hurdle faced by aging services, home care, and hospice organizations is that the criminal history records

check process moves slowly, and can often result in the organizations losing potential employees because of the wait time.

Marcia Tetterton, Virginia Association for Home Care and Hospice

Ms. Tetterton also presented on behalf of aging services, home care, and hospices. Aside from what had already been mentioned by her colleagues, Ms. Tetterton noted that the biggest roadblock she faces because of barrier crimes is with insurance providers. She said that they have had issues with insurance providers refusing to cover homecare employees because of prior barrier crimes, particularly theft crimes. Additionally, she reiterated the cumbersome nature of the criminal history records check process by the Department of State Police.

Presentation: Behavioral Health and Private Providers

*Jennifer Fidura, Virginia Network of Private Providers, and
Jennifer Faison, Virginia Association of Community Services Boards*

Ms. Fidura and Ms. Faison presented together. They stated that the biggest challenge they have identified is that even if there are relief processes or exceptions to barrier crimes, it will not be effective if no employers are willing to hire people that have been convicted of barrier crimes. They also added that over the years, crimes have been added or removed largely due to individual cases.

Ms. Fidura and Ms. Faison offered some possible solutions, including:

- 1) To consider choosing an entire class or classes of crimes and apply an expiration date to that class consistently;
- 2) To remove crimes from their individual sections within the statute and note that it will no longer be a barrier after a certain number of years; and
- 3) To consider a process of relief for other barrier crimes, as in Senator Surrovell's 2016 bill, SB 318.

Ms. Fidura and Ms. Faison expanded on solution 3, noting that the process, if tied to the courts, would offer a prospective employer an objective, third party view of an individual. This way, instead of changing the whole Code of Virginia, the relief process would be on an individual basis. They added that, for individuals who committed a barrier crime as a result of behavioral or mental health, or substance abuse issues, there should be a relief process that does not involve the courts. Ms. Fidura and Ms. Faison also offered that the current screening processes could be modified or strengthened as a part of a new approach to relief.

Presentation: Child Care

Grace Reef, Child Care Aware of Virginia

Ms. Reef stated that although there is an existing waiver and appeal process for barrier crimes-related issues in the child care arena, it does not seem to be working properly. She noted that childcare programs want the ability to share substitutes, which is not currently possible given the background check processes. Ms. Reef said that two of the biggest issues are (1) that no one department "owns" the background check process and (2) the cost of criminal records checks and lack of funding. She added that Florida, Georgia, Louisiana, Michigan, Utah, and Washington all have promising processes that the Joint Subcommittee could look at as examples of how to proceed.

Work Plan and Discussion

Anna Moir, Attorney, Division of Legislative Services

Ms. Moir offered a draft work plan. She noted that this would be the final meeting of 2020 and that the next step was to direct questions from the study to the Department of Health, the Department of Social Services, and the Department of Behavioral Health and Developmental Services. Discussion about the previous presentations followed.

The Joint Subcommittee then voted unanimously to recommend to the 2021 Session of the General Assembly that the study be continued. The meeting concluded at approximately 11:30 a.m.

