

Joint Subcommittee on Public Safety (Work Plan and Background Discussion)

Chapter 781 of the 2009 Session of the General Assembly (the 2009 Appropriation Act) authorizes the Chairmen of the Senate Finance and House Appropriations Committees to create two joint subcommittees on prison and jail concerns (see Items 387 and 388). In order to facilitate these reviews, the Chairmen, Senator Charles J. Colgan and Delegate Lacey E. Putney, have appointed one joint subcommittee to address both of these concerns. The members are Senators Janet D. Howell, Henry L. Marsh III, Kenneth W. Stolle, and Walter A. Stosch, and Delegates Beverly J. Sherwood, Phillip A. Hamilton, William R. Janis, and Onzlee Ware.

Joint Subcommittee Meetings

Senator Janet D. Howell and Delegate Beverly J. Sherwood have scheduled the following meetings for the joint subcommittee during 2009:

- Thursday, May 21;
- Tuesday, June 16;
- Thursday, September 17; and
- Monday, October 19.

Each meeting will begin at 12:30 p.m. and last for about two hours. The May and September meetings will be held in the House Appropriations Committee room, and the June and October meetings will be held in the Senate Finance Committee conference room. These meetings will be held on the same days that either the full Senate Finance or House Appropriations Committees are already meeting in Richmond.

Charge to the Joint Subcommittee

The language in the appropriation act directs the joint subcommittee: (1) to consider steps which may be appropriate to reduce the growth in the numbers of nonviolent, lower risk offenders entering state correctional facilities; and (2) to review the Commonwealth's policies with respect to the oversight, approval and financing of local and regional jail capital projects and operational expenses, with a view towards defining and meeting the Commonwealth's long-term obligations for local and regional jails and related programs. No specific reporting date was included in the language.

The language in paragraph G.2. of Item 387 recognizes that the consideration of steps to reduce the numbers of nonviolent, lower risk offenders entering state correctional facilities should:

- Recognize the need to protect public safety;
- Enable the courts to sentence offenders to appropriate alternative punishment options; and,
- Provide the Department of Corrections (DOC), regional and local jails, and local community corrections and pretrial release programs with the appropriate programs and management tools to operate within the resources available.

The paragraph's language also states that the appointments to the joint subcommittee may include members of the Senate and House Committees on Courts of Justice, since these committees have jurisdiction over the criminal laws and sentencing policies which are relevant to any discussion of alternative punishment options.

In approving the two language amendments authorizing the joint subcommittees, the Senate Finance and House Appropriations Committees recognized an important underlying concern based on the fiscal outlook for the Commonwealth. Prison and jail facilities are expensive to build and operate, and Virginia has made a substantial investment over the past two decades in upgrading and expanding state, regional and local correctional facilities and in improving salaries and benefits for correctional officers. However, the Commonwealth is now in a period in which revenues have declined and are expected to grow more slowly as the economy begins to recover. For the 2010-12 biennium, a substantial gap is expected between projected state revenues and the cost of maintaining current services. Consequently, the ability to allocate funds for operating new facilities is severely limited. Furthermore, Virginia's debt capacity (the ability to borrow money to build new state facilities or to contribute to the construction of regional or local facilities) is expected to be constrained for the next several years.

Given these circumstances, during the 2009 Session the committees recognized the General Assembly can no longer make open-ended commitments to approve additional prison or jail capacity over the next several years. Instead, it is essential that the committees review the current situation and determine ways that the future growth in prison and jail expenditures can be moderated, while maintaining the Commonwealth's commitment to public safety. The joint subcommittee was authorized with this intent in mind.

Background Discussion

Virginia has expanded and modernized facilities, improved salaries, employee benefits and training, and improved medical and treatment programs in the Department of Corrections (DOC). Likewise, the Commonwealth has contributed significant amounts to expanding and modernizing local and regional jail facilities, and improving jail staffing and salaries and benefits.

Prisons and jails are expensive to build and operate. Each new 1,000-bed prison approved by the General Assembly will cost over \$100 million to build, and over \$25 million each year to operate. A replacement jail for the City of Richmond is currently projected to cost \$162.7 million for 864 beds. The 2009 General Assembly has just capped the Commonwealth's capital contribution to the new Meherrin River Regional Jail, serving Dinwiddie, Brunswick and Mecklenburg Counties, at \$50 million.

Since 1990, Virginia has added over 22,000 state prison beds at a capital cost of over \$1.1 billion (this includes St. Brides Phase II and the new facility in Grayson County, neither of which have been opened yet). For jails, the total capital cost of adding about 11,470 beds since 1993 has been almost \$1.2 billion, including both the state and local shares of the cost. Virginia spent about \$130 per capita on state corrections in FY 2005, ranking 19th among the 50 states and just above the national average. For jails, Virginia spent about \$42 per capita in FY 2008, ranking second highest in the nation (after Massachusetts). One in every 44 Virginians is in prison or jail or under community supervision in probation or parole. According to the March 2009 report of the Pew Charitable Trust, Virginia ranks 13th highest in the share of adults in prison or jail, and 44th in the share of adults on probation or parole.

A key question is whether Virginia is achieving the best possible balance between incarceration and alternatives to incarceration. When parole was abolished and felony sentencing guidelines were adopted in 1994, an important goal was to require longer sentences for violent and repeat offenders, and to divert -- to the extent possible -- up to 25 percent of the nonviolent, lower risk offenders to alternative methods of punishment other than incarceration in prison. Nonviolent offenders have never been convicted of a violent felony as defined in Section 17.1-805, Code of Virginia, or burglary of an occupied dwelling; this definition takes into account prior offenses as well as current offenses. Lower risk offenders are those sentenced to a term of incarceration of one year or more for fraud, larceny, or drug offenses who score at or below 38 on the risk assessment scale of by the Virginia Criminal Sentencing Commission, and are thereby considered at lower risk of recidivism. About 28 percent of nonviolent, lower risk offenders are now being diverted to alternatives.

Virginia's felony sentencing guidelines were also intended to assure that felony offenders would serve at least 85 percent of their nominal sentence. At the time sentencing guidelines were adopted in 1994, the General Assembly also created a statewide system of community corrections for state-responsible offenders under the supervision of DOC, and a system of local community corrections and pre-trial release programs under the supervision of local or regional Community Criminal Justice Boards.

Recent evaluations have concluded that Virginia has been successful in reserving expensive prison space for violent and repeat offenders. For example, the proportion of violent offenders in Virginia's state correctional facilities (as defined in statute for purposes of the guidelines) has increased from about 70 to 80 percent over the past 15 years, according to the Virginia Criminal Sentencing Commission. This means the proportion of nonviolent offenders in Virginia's prisons is smaller today than in 1994. Furthermore, the National Center for State Courts concluded in 2008 that Virginia had essentially eliminated racial disparities in felony criminal sentencing, which was an important objective of the move towards sentencing guidelines begun in the early 1980's. To a very great extent, offenders who commit felonies in any part of Virginia today are sentenced based on objective factors, including the type of offense, the offender's past criminal history, and specific aggravating or mitigating factors related to the offense, but not other factors such as race, age, gender, economic status, or region of the Commonwealth, which are not relevant to the sentencing decision.

Virginia is also considered the national leader in the use of risk assessment guidelines to reserve expensive prison cells for those offenders who pose a risk to society and to divert nonviolent, lower risk offenders, to the extent possible. Beginning in 2002, an empirically-based risk assessment process has been implemented in all judicial districts. Currently, if a nonviolent offender (who has otherwise been sentenced to prison) scores at or below a certain threshold (38) on the risk assessment scale, he is recommended for an alternative sentence. Nonviolent offenses are specifically defined for this purpose in statute. No other state has implemented such a process on a statewide basis. The local community corrections programs have also begun to use their own risk assessments.

Coincident with these efforts over the past two decades, Virginia and the nation have witnessed a significant decline in rate of violent crime, which had risen sharply from the mid-1980's to the early 1990's. Virginia also has a relatively low recidivism rate of about 28 percent, and is tied at sixth lowest among the 40 states that measure recidivism as the proportion of offenders released from state prison that return to prison within three years.

Nonviolent, Lower Risk Offender Population -- Issues of Concern

Among the issues for consideration by the joint subcommittee are whether it may be beneficial to expand the use of alternative sentencing for nonviolent, lower risk offenders and for habitual technical violators. A related issue is to determine whether expanded substance abuse treatment (both in prison and following release from prison) may help reduce recidivism. The 2009 appropriation act directed the Secretary of Public Safety to establish a task force to develop recommendations for the joint subcommittee in these areas.

Offenders Recommended for Alternative Sentences. There may be additional opportunities to expand the use of alternative methods of punishment for nonviolent, lower risk offenders. For example, the Virginia Criminal Sentencing Commission reports that in FY 2008, of the 4,364 total nonviolent offenders recommended by the sentencing guidelines for a term of incarceration in prison, 2,199 (or 50.4 percent) were recommended for an alternative sanction (based on the risk assessment instrument). However, only 51.6 percent (1,134) of these actually received an alternative sentence. This suggests there may be as many as 1,000 nonviolent offenders entering Virginia's prisons each year who may (according to the risk assessment instrument) be appropriate candidates for alternative methods of punishment, if programs for this purpose were available to the sentencing judge. The National Center for State Courts has validated this risk assessment instrument through the analysis of empirical data as a reliable method for predicting lower recidivism.

Habitual Technical Violators. Another group of offenders for whom more alternatives may be needed are technical probation violators. In FY 2006, 47 percent (5,875) of the 12,523 total new court commitments to prison were probation revocations. Four-fifths of these had committed new crimes. The remaining one-fifth (1,185) had not committed a new crime, but had violated the terms and conditions of their probation to the extent that the court decided a sanction such as return to prison was warranted. DOC refers to these 1,185 offenders as "habitual" technical probation violators. Almost half of these have a violent offense in their criminal history, or medical or mental health issues. However, DOC has estimated that the remaining 628 may be appropriate for placement in an alternative facility or program.

Assuming over 1,000 admissions per year and a median sentence length of 22 months, a total of about 3,000 habitual technical probation violators would be housed in state correctional facilities by 2013, according to a 2007 DOC estimate. Over half of these may be appropriate for a lower-security, return-to-custody facility, or other alternatives. For example, the proposed new correctional facility at Charlotte County is being designed to include a program for technical violators. Other alternatives may also be possible.

Discussion of Alternatives. The key question is what kinds of alternative programs are needed and would be acceptable to sentencing judges and the General Assembly. In order to address this concern, Senator Kenneth W. Stolle introduced Senate Bill 1517 and Senators Stolle and Janet D. Howell introduced SB 1540 during the 2009 Session of the General Assembly with the intent of expanding the use of electronic incarceration. During the deliberations on these bills there was discussion of the possibility of assigning offenders who were sentenced to one year or more in prison to serve a portion of their sentence in jail and the remainder of their sentence on electronic incarceration. There was also discussion of whether Sheriffs and regional jail superintendents might be able to take on the increased responsibilities that this program might entail, or whether the electronic incarceration program should be expanded in DOC. In view of the limited time for consideration of these issues, the patron requested the bills not move forward during the Session, and instead the Senate Finance Subcommittee on Public Safety proposed a joint subcommittee to address these issues during the interim.

Also during the 2009 Session, Delegate Beverly J. Sherwood introduced House Bill 2567, which was intended to reduce the amount of time certain offenders would have to spend on probation. This bill would have required judges to remove from probation supervision those offenders who have been on supervision for at least two years, and who have satisfied all of their conditions of probation (excluding payment of fines, costs and restitution). HB 2567 would also have authorized DOC to establish a goals system through which an offender could earn a reduction in the length of time required for probation supervision by achieving certain specified goals. This is consistent with research findings demonstrating that offenders who are successful in meeting certain goals during the first year on probation are less likely to recidivate. The bill was not reported by the House Committee on Courts of Justice.

House Bill 2309 (Chapter 240 of 2009), introduced by Delegate Kenneth Melvin, was adopted, which provides that no probationer shall be kept under supervision solely on the basis of his failure to make full payment of fines, fees or costs, provided that the court and the Attorney for the Commonwealth do not object to such removal. This legislation may have the effect of reducing the amount of time which certain offenders may have to spend on probation, and may in turn reduce the number of offenders returning to prison.

Substance Abuse Treatment. To a great extent, violent crime and the growth in prison populations nationally and in Virginia have been driven by drug abuse and drug trafficking, and there has been considerable discussion of the extent to which felony sentencing and correctional policy should encourage the provision of substance abuse treatment services, both in prison and jail as well as for offenders under supervision in the community. A substantial body of

research has demonstrated that substance abuse treatment, under certain program designs and with rigorous follow-up after release from prison, can be effective in reducing recidivism. This research has led to the development of “Evidence-Based Practices,” to encourage states to support specific types of programs which have been demonstrated to be effective.

One such program is the “Therapeutic Community” in prison, in which the inmates themselves play an active role in leading the treatment program. Virginia’s largest such program is at Indian Creek Correctional Center, in the City of Chesapeake. Research has shown that such programs are more effective when there is specific follow-up in the community after release from prison, such as a “Transitional Therapeutic Community,” or residential substance treatment program. Unfortunately, over the past year general fund revenue reductions have resulted in the elimination of state support for these programs for offenders who are making the transition from prison back to their home communities.

The General Assembly did include language in the 2009 Appropriation Act directing DOC, in coordination with the Supreme Court of Virginia, to develop a behavioral corrections program. Offenders eligible for this program would be those for whom Virginia’s felony sentencing guidelines recommended a prison sentence of three years or more and whom the court determined require treatment for drug or alcohol abuse. However, violent offenders as defined by the sentencing guidelines and drug dealers, including both current and previous offenses, are specifically excluded from the behavioral corrections program. For offenders in the behavioral corrections program, the court would be permitted to suspend the remainder of the sentence and order the offender released to probation upon successful completion of a prison treatment program of at least 24 months. This program may help to reduce future growth in the substance-abusing population in state correctional facilities.

Secretary’s Task Force. Along with a joint subcommittee to review these concerns, the 2009 Appropriation Act also directed the Secretary of Public Safety to establish a task force to develop recommendations to expand the utilization of alternative methods of punishment for nonviolent, lower-risk offenders who have been sentenced by a court to a term of incarceration. The language suggested that this be a cooperative effort including the Supreme Court of Virginia, the Virginia Sheriffs’ Association, the Virginia Association of Regional Jails, the Virginia Association of Commonwealth’s Attorneys, and the Virginia Criminal Sentencing Commission. It was the intent of the General Assembly in adopting this language that the Secretary’s task force would review the issues raised in managing the growth of the state-responsible offender population, and that the task force would present its findings and recommendations to the joint subcommittee during the interim.

The first two meetings of the Secretary's task force were held on May 28 and June 17. Two additional meetings are scheduled for July 23 and August 20, and the task force is scheduled to report to the Joint Subcommittee on Public Safety on September 17, 2009.

Local and Regional Jails -- Issues of Concern

There has been considerable discussion for several years about the state policy for reimbursing regional and local jail capital projects. Currently, state law permits the Commonwealth to contribute up to 50 percent of the capital cost for regional jails and up to 25 percent for local jails. The Commonwealth's share of these construction, expansion or renovation costs for regional and local jails is usually funded through the sale of bonds by the Virginia Public Building Authority (VPBA), with a cash payment made at the mid-point of construction. However, the suggestion has been made that the 50 percent fiscal incentive for regional jails may no longer be necessary. The 50 percent and 25 percent state incentives have been in place since 1993. Regardless, given the constraints on Virginia's debt capacity, no additional commitments for state funding should be made for the time being.

Other issues may include:

1. Has the current review process for approving local and regional jail capital projects been effective in controlling costs?
2. What is the appropriate regulatory and oversight role for the Board of Corrections in establishing capital and operating standards for local and regional jails?
3. Should the Board of Corrections review the need for jail construction, expansion and renovation projects and these projects' estimated costs prior to the General Assembly's consideration of these projects?
4. Should the General Assembly's approval of jail construction, expansion, and renovation projects be time-limited? For instance, should a project's authorization expire if a community corrections plan and construction planning documents have not been finished within two years?
5. Should jail construction, expansion and renovation projects be subject to the same capital outlay budgeting process as other types of capital projects?

6. Should the Board of Corrections count double-bunking in its measurement of jail capacity, and should Compensation Board staffing standards be adjusted so that this higher capacity does not automatically result in the authorization of additional positions?
7. Should the approval of jail construction plans be conditioned on the optimal (“best practices”) use of community corrections and pretrial release programs, and how should the budgeting for such programs in new jails coming on line be handled?
8. What should be the Commonwealth’s policy with respect to housing federal inmates in local and regional jails?
 - a. How should state funds for jail operating expenses be reduced when jails are reimbursed by the federal government for holding federal prisoners in the same space for which jail positions have already been paid with state funds from the Compensation Board?
 - b. Should any facility be exempt from Virginia’s federal cost recovery methodology?
9. Should jails be expected to hold a certain number of state inmates, when the Commonwealth has provided a substantial proportion of the funds for building and operating the jail?
10. Should the Director of DOC be required (and not merely authorized) to transfer inmates from one jail to another, based on his assessment of system-wide demands and available resources?
11. Does DOC have sufficient resources for auditing and inspections to assure that jail performance standards are being met?
12. Do current budgeting procedures for reimbursing localities for the operating costs of local and regional jails represent the best possible approach, recognizing the Commonwealth’s fiscal constraints?

Language was also included in paragraph F. of Item 388 in the 2009 Appropriation Act specifying that, in order to reduce jail capital and operating costs, the Board of Corrections was encouraged to revise, as appropriate, the board’s Standards for Planning, Design, Construction and Reimbursement of Local Correctional Facilities, in order to:

- Conform state and local security standards to the extent possible;
- Encourage construction of minimum security facilities for housing convicted misdemeanants and other nonviolent inmates; and,
- Require new jail construction or expansion projects to include adequate space to operate treatment programs, including but not limited to, substance abuse treatment.

The joint subcommittee may wish to consider the extent to which the General Assembly believes the Board of Corrections should continue to play an active role in both establishing and enforcing standards for jail construction and operations in the future, especially considering the Commonwealth's substantial financial stake in these facilities. This is especially relevant in cases where public-private partnerships (PPEA) are proposed for new jail facilities.

Mental Health Issues. Another issue of concern in Virginia and nationally is the extent to which local and regional jails incarcerate large numbers of the mentally ill. Recent surveys have suggested about 16 percent of Virginia's jail inmates have mental illness to some degree. By statute, DOC is responsible for mental health treatment in state correctional facilities, and the offenders in these facilities have committed serious crimes and require treatment in a secure correctional setting. However, there is no statutory basis for determining the responsibility for providing treatment for mentally ill persons held in jail. Sheriffs and regional jail superintendents have expressed serious concerns about the lack of treatment funding and positions to manage mentally ill offenders, many of whom could be in treatment programs or facilities. A key question is whether there are alternatives for minimizing the use of jails for holding the mentally ill, and should the Commonwealth or the localities be responsible for funding treatment staff in jail or treatment programs in facilities other than jails?

In May, 2009, the Compensation Board, in cooperation with the Department of Mental Health, Mental Retardation and Substance Abuse Services*, will update the jail mental health survey initiated in 2006 by the Senate Finance Committee. The new survey will add questions about the types of offenses committed by the mentally ill housed in jail to help determine the extent to which these persons might be good candidates for diversion to treatment. According to officials at the U.S. Bureau of Justice Assistance, Virginia is the only state to have completed a survey of 100 percent of its jails on this subject.

* *As of July 1, 2009, the name of the department was changed to the Department of Behavioral Health and Developmental Services (DBHDS).*

Conclusion

To address these issues, the joint subcommittee is committed to working with the Virginia Sheriffs Association, the Virginia Association of Regional Jails, the Virginia Municipal League and Virginia Association of Counties, the Virginia Association of Commonwealth's Attorneys, the Judicial Department, and the Secretary of Public Safety and the agencies of the Executive Department.

Proposed Meeting Agendas (Preliminary)

Thursday, May 21, 2009 (12:30 p.m. – 9th Floor, GAB)

- Election of Chairman and Vice-Chairman, and Opening Remarks
- Virginia's Debt Capacity
- Offender Population Forecast Accuracy Report
- Preliminary Staff Report on Jail Finance
 - Comparative Survey of State Aid for Jails
 - Overview of Jail Capital Assistance
 - Overview of Jail Operating Assistance
 - Issues:
 - State participation in capital projects
 - State reimbursement of operating costs
 - Federal inmate cost recovery
 - Community corrections
 - Mentally ill inmates
 - Measurement of bed capacity

Tuesday, June 16, 2009 (1:0 p.m. – 10th Floor, GAB)

- Statutory Framework (Legislative Services)
- Department of Corrections Review of Jail Capital Projects (DOC)
- Jail Operating Assistance (Compensation Board)
- Jail Bed Capacity Measurement
- Federal Inmates in Virginia's Jails
- Local Community Corrections and Pre-Trial Release Programs

Thursday, September 17, 2009 (1:00 p.m. – 9th Floor, GAB)

- Presentation by the Secretary of Public Safety's Task Force
- Sentencing Guidelines and Risk Assessment for Lower-Risk Non-Violent Offenders (Sentencing Commission)
- Mentally Ill in Virginia's Jails (Updated Compensation Board Survey)

Monday, October 19, 2009 (1:00 p.m. – 10th Floor, GAB)

- Follow-up, discussion and public comment by key stakeholders
- Consideration of recommendations