



COMMONWEALTH of VIRGINIA

Office of the Governor

Commission to Examine Racial Inequity in the Law

MINUTES [?]

Meeting: Wednesday, July 22, 2020

1pm– 4pm

Via [WebEx](#)

1. Call to Order

- a. Cynthia Hudson calls the meeting to order at 1:07 pm. Notes that we are able to meet electronically due to the state of emergency due to COVID-19.

2. Public Comment

- a. Hudson notes that public comments will not be received in the WebEx chat. Notes that we have a comment from John Whaley in written form that Hudson reads aloud. This comment mentions that Laurie Robinson's presentation was very informative at highlighting arrests in the United States and that most civilian encounters with police are non-violent. Also notes that police ride-along programs are good opportunities to educate local citizens. Asks if the Commission would consider a greater emphasis on ride-along programs.

Jessica Killeen notes that the organization New Virginia Majority also wrote a public comment and this will be posted on the Commission website.

3. Administrative Items

a. Adopt July 1, 2020 meeting minutes

Hudson asks for a motion to adopt, a motion is taken up. No discussion follows. Judge Jones seconds. The minutes are adopted without objection.

b. Attendance & Roll Call

Members in Attendance:

- i. Carla Jackson
- ii. Andrew Block



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- iii. Cynthia Hudson
- iv. Michael Herring
- v. Jill Hanken
- vi. Jerrauld Jones
- vii. Henry Chambers
- viii. Birdie Jamison
- ix. Leslie Mehta

Hudson notes that Judge Jones is celebrating a birthday today and the group wishes him a happy birthday.

4. Review of recommendations from July 1, 2020 meeting

a. **Andrew Block begins presentation.** Notes that the items below are both proposals that were approved last meeting and in some cases alternative language that Block will be proposing.

- **A1 (merged with A4):** Require local law enforcement data reporting on uses of force, pedestrian stops, all civilian complaints (amending the Community Policing Act), and enact an enforcement mechanism for local agency data reporting requirements.
- **A3:** Establish a public, free database of downloadable data elements.
- **A5** as adopted July 1, 2020: “The Commission will recommend the Governor include in his legislative recommendations some means by which the public has more transparency regarding officer misconduct records that cover engagement with citizens.”

Alternative Proposed Language: Create more public transparency regarding law enforcement officer misconduct involving improper use-of-force, and criminal investigations of law enforcement officer conduct.

Block proposes this language above for clarifying A5 and then opens the floor for comment.

Hudson, Comment: I think the reformulated language is tighter and makes the same point, which is to leave to the governor flexibility in his consideration of this proposal. Willing to entertain a motion to reconsider.



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Hanken motions to reconsider the proposal language of A5 so that it reads instead the language suggested by Block above. Seconded by Jamison.

Jackson recommends removing the comma after use of force. Hanken accepts the amended version of her motion.

Chambers, Question: is this replacing the whole or part of the proposal?

Hudson: the preamble, "The Commission will recommend the Governor include in his legislative recommendations" is included. Clarifies with Hanken that this is the motion as she put it forward.

Hudson calls the question. Motion to adopt the new language for A5 passed unanimously on roll call vote.

The final version of **A5** now reads: The Commission will recommend the Governor include in his legislative recommendations some means of creating more public transparency regarding law enforcement officer misconduct involving improper use-of-force and criminal investigations of law-enforcement officer conduct.

- **B1** (proposed language change in strikethrough and italics): Mandate and empower civilian review boards to investigate and address complaints of misconduct, including the use of professional staff, subpoena power, ~~the power to investigate complaints~~, and *authority* to make recommendations on discipline.

Block notes that he kept the language mostly as is but made the changes above.

Jackson moves to adopt the updated language. Hanken seconds the motion.

Herring, comment: the subpoena power is not doable; wants to be on record as noting this.

Hudson notes that this proposal overall was already adopted, so that type of consideration is not before the Commission, but the comment is now on the record.

Jones, comment: the recommendation is very important to places like Hampton Roads and Virginia Beach, where there is already expressed support for stepped up civilian review of police incidents. This idea is gathering support in the public and this is on the right track.



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Chambers, comment: the VA legislative Black Caucus has also recommended this as well.

Hudson calls for a vote. Without objection, the motion passes.

The final version of **B1** now reads: Mandate and empower civilian review boards to investigate and address complaints of misconduct, including the use of professional staff, subpoena power, and authority to make recommendations on discipline.

Block notes that recommendation **A2** (Amend officer-involved shooting report requirement to include brief narrative and demographic information about victim) was rejected at the July 1, 2020 meeting.

5. Discussion of remaining policy proposals in the Memorandum regarding Policing Recommendations for Commission's Consideration

- **B2** proposed updated language in italics and strikethrough: Create civil liability for *bias-based profiling, as defined by Va. Code § 52-30.1* (~~either disparate impact or intentional~~), ~~expand profiling protections~~.

Block, comment: this would be a recommendation to create civil liability for biased based racial profiling. Section 52-30.1 of the VA code covers biased based profiling but there is no enforcement mechanism to this part of the code. This code section was adopted last session.

Jones, question: so this not only creates a civil cause of action, but also does it also creates an exception to sovereign immunity? The idea is to create a civil remedy right?

Block, responding: I think that would be a question for the courts to sort out. Depending on how it is written, the legislature would address that when they are crafting the legislation. Yes the idea is to create civil liability.

Jackson, comment: DMV has a gender identity option under gender now. If there is a difference between this and that, we can still capture that part of the code here.

Mehta, comment: I see this as two different things potentially with regard to how gender is stated.



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Hanken, comment: I support this. The code should have enforcement mechanisms.

Hanken moves to adopt A5. Herring seconds. Hudson calls the question. Motion passed unanimously on roll call vote.

The final version of **B2** now reads: Create civil liability for bias-based profiling, as defined by Va. Code § 52-30.1.

- **B3:** Provide additional decertification criteria for *law-enforcement* officers based on *repeated or serious* misconduct or dishonesty.

Block, comment: this is related to decertification of law enforcement officers. This would expand the criteria that makes people eligible for decertification. The language is amended to cover all law enforcement. We also want to make sure that we are talking about frequent trouble officers or actually serious incidents. This is a recommendation that has appeared with other groups as well (and Association of Chiefs of Police).

Chambers, comment: looking at the Association of Chiefs report I agree this is recommended and good to do.

Jamison also notes her support.

Jamison moves to adopt and Mehta seconded. Hudson takes up the motion, hearing no objection, the motion to adopt carries.

The final version of **B3** now reads: Provide additional decertification criteria for law enforcement officers based on repeated or serious misconduct or dishonesty.

- **B4:** Require the Attorney General's office to investigate and prosecute serious criminal allegations against law-enforcement officers.

Block, comment: this is about creating independent investigation of law enforcement. I know Mike Herring had some thoughts about instead of requiring investigations, giving the AG concurrent jurisdiction. My concern about that is that concurrent jurisdiction is permissive right now, which requires the AG's office to



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be invited in, which might lead to the same problems we are trying to address. If we want to re-word it to be determined by the AG's office if they want to investigate or not, then we might want to try wording it that way.

Jamison, question: asks how many actions would there be a year?

Block, responding: just looking at the use-of-force report that the state police put out, maybe 20 or 30.

Herring, comment: there is a definitely going to be a fiscal impact to create a prosecutorial unit. I did not mean to suggest this proposal to read 'with the consent of the local commonwealth's attorney.' I was thinking where the AG simply has a prerogative to intervene. Ideally the unit that is created would be a good one in doing these reviews, but where a local CA wants to proceed with a prosecution but the AG determines otherwise, the local CA will have to respond to the electorate in ways that the AG will not. I don't want to overlook the talent in some of the local CA offices.

Block, comment: I guess part of this is about restoring public confidence, giving authority to the AG to decide, or requiring them to act, either makes sense to me.

Hanken, question: I wonder if instead of saying 'require,' if maybe we just say 'allow.' Is there any existing authority then today? Also, do the chiefs of police in their memo include anything on this topic?

Herring, responding: I don't think the AG's office currently has the authority to prosecute these cases, and I don't remember anything from that memo of the chiefs of police.

Hanken, question: so does that allow the opportunity to create concurrent authority?

Herring, responding: we can word it as 'allow' or 'concurrent,' but make clear the AG does not need the consent of the Commonwealth Attorney.

Hudson, comment: if we make the AG's authority here permissive, they would have to reconcile where there is a conflict between the AG and the local CA.

Herring moves to adopt a modification of B4 that would describe concurrent jurisdiction for the AG's office to investigate, clarifying that the AG's office does not have to defer to, or seek consent from, the local Commonwealth's Attorney.

Jamison seconds Mike Herring's motion.



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Hudson calls the question. Motion passed unanimously on roll call vote. Jones abstains.

The final version of **B4** now reads: Give the Attorney General's office concurrent jurisdiction to investigate and prosecute serious criminal allegations, without the need for consent from the Commonwealth's Attorney, against law enforcement officers.

- **B5** (new proposed language in italics): Strengthen civil liability, and limit sovereign immunity protections, for law-enforcement officers engaged in misconduct *and their employers*. (pg. 7)

Hudson, comment: this concerns rolling back sovereign immunity protections under state law, not talking about qualified immunity under federal law. A couple of things have shaped my thinking around this: 1. This issue seems to be a tenet of policing reform across many advocacy groups right now across the country, 2. Colorado, which is the first state to enact police reform, adopts and codified many of these proposals and one similar to this one. Massachusetts also passed a bill that addresses this.

These other state adoptions might also inform how Virginia goes about looking at what sovereign immunity changes can be made. Andy and the students had three proposals for how to roll sovereign immunity back. One of those proposals would simply eliminate by statute, sovereign immunity to local governments, which I thought was too broad, but this is more tailored. The Colorado model might be good: officers alleged to have committed misconduct will be submitted to civil liability without the immunity available as a defense. If a judgement is held against them, the officer has personal exposure, subject to indemnification by the employing entity. That is only if the employing entity has determined that that individual did not commit the misconduct that is at issue. If they conclude the officer did commit the misconduct, then they would have no responsibility to indemnify.

The other solution is to look at the Virginia Tort Claims Act, which limits the amount of civil liability for the state. That statute preserves the complete sovereign immunity of localities. I agree with the thrust of the proposal though to get at some level of exposure of the governments that employ these officers.

Chambers, comment: I'm not as sure that there needs to be more on this one than the parallel to B2; this will go through a whole lot of changes, but I think I'm more for a cleaner and general approach and let the Governor's office handle the details. Language parallel to B2 would work for me.



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Hudson, response: the approach I'm suggesting here is that we do not suggest a roll-back of sovereign immunity completely, but that we recommend a measured or moderated roll-back.

Hanken, comment and question: I agree with the way this is crafted right now. It gets at the intent of the Commission without getting into the weeds of a legislative proposal. I'm curious about Colorado – maybe staff can send us this?

Hudson calls for a motion, Hanken moves for an adoption of B5 as written. Herring seconds the motion. Motion passed unanimously on roll call vote. Jones abstains.

The final version of **B5** now reads: Strengthen civil liability, and limit sovereign immunity protections, for law enforcement officers engaged in misconduct and their employers.

- **C1** (new proposed language in italics): Mandate the adoption of certain requirements for local *and state* use of force policies.

Potential Updated Language: *State adopt model use of force policies that require law-enforcement agencies to do the following: ban chokeholds, mandate warnings before shootings withdraw force once threat subsides, create duties to intervene to prevent excessive force and provide medical aid, and prohibit use of force to execute non-violent felony or misdemeanor arrests.*

Block, comment: this relates back to requiring the state and localities adopt specific use-of-force policies. Right now the way the state handles training, the DCJS has adopted policies that would be analogous to what is in the code.

Herring, comment: on your potential language, I would substitute 'limit' for 'prohibit.'

Block, responding: I agree with that.

Chambers, question: the idea of the potential language is that the state would adopt a model use-of-force policy and local police forces would be required to adopt this too?

Block, responding: or local police forces would have to adopt their own and at a minimum include these state elements.

Jackson, question: the issue that I've seen is how each officer determines an exigent circumstance. Can we get at what is actually an emergency situation?

Herring, comment: I think we need to get at the objective reasonableness standard – it is not based on the perspective of the officer, but an objective reasonable officer



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with the appropriate training. But I don't know that we should go that far into the weeds here. Maybe add it to the commentary that legislation should include an objective reasonableness standard.

Hanken, comment: There is ambiguity to some of these elements. Do we want the state to adopt model use of force policies that addresses these things, but it doesn't go to the extent of banning / prohibiting, because there may be gray areas for some of these?

Hudson, comment: yes, perhaps there needs to be qualifiers. Certainly if the state adopts model use-of-force policies, we need to state the direction we want them to take to address it.

Block notes that this language is just suggestive for now, and can be changed to be more specific.

Jones, question: are there model use-of-force policies that are adopted by other states? We wouldn't be the first to do it?

Hudson, responding: No, Virginia would not be the first.

Jones, responding: So this isn't ground breaking. There is a good way to identify use-of-force policies. Maybe be less specific and more general in terms of our recommendation.

Hudson, comment: Let me suggest an example of this from New Virginia Majority: Ban warrior training, and use-of-force policies aimed at readiness to kill, implement a last resort use-of-force policy, emphasize de-escalation tactics, use of force as last resort, duty-to-intervene clauses, and other policies of that nature. That is an approach at least one group has taken.

Jamison, comment: Notes the Virginia Black Caucus proposals about use-of-force policy suggestions that are out there already and that we want those things to be definitely limited.

Hudson makes a motion suggestion: Recommend that the state adopt model use-of-force policies with minimum requirements to be adopted by law-enforcement agencies that address limitation or ban of chokeholds, warnings before shootings, limiting use of excessive force and force as a last resort, creating duties to intervene to prevent use of excessive force and provide medical aid, and limit use of force to execute non-violent felony or misdemeanor arrest.

Jackson, comment: National Association of Chiefs of Police incorporated some of these recommendations and we might want to use those.



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Herring suggests using “reducing force as a threat subsides” in lieu of “limiting use of excessive force and force of last resort.”

Hudson agrees to this change to her wording.

Hudson asks for a motion: Jones makes the motion to adopt Hudson’s language. Jackson seconds the motion. Hearing no objections, the motion to adopt carries.

The final version of **C1** now reads: Recommending that the state adopt model use of force policies with minimum requirements to be adopted by law enforcement agencies that address limitation or ban of chokeholds, warnings before shootings, reducing force as a threat subsides, creating duties to intervene to prevent use of excessive force and provide medical aid, and limiting use of force to execute non-violent felony or misdemeanor arrest.

- **C2:** Add additional community members to the DCJS Training Committee.

Jones, question: Who appoints them?

Block, responding: I believe the DCJS board and staff. Not sure exactly, I think it is an agency decision.

Hudson, question: Would your proposal change the appointing authority?

Block, responding: No, and I think we can leave it pretty general for now. There are ways we can do this to bring more voices to the table. There needs to be broader representation.

Hudson, comment: Should we amend the proposal to state that? Add additional community members to the DCJS with a view toward expanding diversity across various areas including but not necessarily limited to geography, rural vs. urban, whatever else you want to add but can we build on this and have a good basis for a motion and an action.

Jones moves to adopt the existing recommendation, but modified to make sure the language states what we are getting at, which is a broader cross section of the community. Jamison seconds the motion.

Hudson calls the question. Motion passed unanimously on roll call vote. Mehta abstains.

The final version of **C2** now reads: Add additional community members to the DCJS Training Committee with a view toward expanding diversity across a broader cross section of the community.



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- **C3:** Ban no-knock warrants (“Breonna’s Law”).

Jamison, comment: Should look at limiting no knocks rather than banning them entirely.

Herring moves to modify C3 to reflect a “further limit” to the use, rather than a ban. Jamison seconds the motion.

Block, question: I have a question for Mike. Would it be helpful to say ‘further limit no knock warrants to the following circumstances’ or no?

Herring, responding: I think it would take us a while to do that. It would possibly invite criticism on other recommendations.

Hudson calls the question on ‘further limit’ amended motion. Motion passed unanimously on roll call vote.

The final version of **C5** now reads: Further limit no knock warrants (“Breonna’s Law”).

Herring (general question): I approve of C4 and C5 [stated in advance of stated need for early departure from meeting].

[Continuing...], and I read a memo that had been circulated about our not recommending anything that encourages diversity in law-enforcement hiring – is that the will of the committee?

Group responds in the negative.

Herring leaves the meeting at 2:51.

- **C4 (suggested edit in italics):** Reduce *the number of* arrestable offenses.

Block, comment: There was a suggestion about looking at things that don’t need to be criminal actions. Things that can be served by summons rather than by arrests. It allows for what Herring talked about and other things brought up at the last meeting.

Jones, question: This would take a comprehensive review of the code yes?

Block, responding: Yes, or of court data, to see what are the most frequently occurring misdemeanors that are perhaps more nuisance crimes. NY City did this and they decriminalized the lower level offenses to reduce contact between police and citizens which has been an effective strategy.



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Jamison, question: Is this an issue in Virginia? Aren't there a number of things already that an officer can issue a summons for?

Block, responding: I think this gets more at requiring a summons rather than an arrest, rather than leaving it subjectively up to the officer. Can also do what they have done with marijuana, where it doesn't make sense to have something decriminalized.

Hudson, question: Should we say 'study'?

Jones, comment: Virginia used to have way more felony offenses than other states. The arrestable offenses that we are referring to here go at possible jail or prison. So the number of class 3 and 4 misdemeanors are a much smaller number because the GA kicks these up to class 2 or 1. We have a lot of things that people are able to be arrested for in Virginia. So I think this is a worthwhile review and if this language gets us to a comprehensive review of it, I can support that. But just to say it without a little more guidance isn't as productive. I think something similar to C5 is a good way to go; I think we ought to phrase it more in terms of a comprehensive review with a goal of reducing the nature and number of these offenses.

Hudson, question: So, your motion recommends that there be a comprehensive review of the number and nature of arrestable offenses in Virginia law and to recommend reductions where the findings may warrant?

Jones adopts this as the motion and Chambers seconds.

Chambers, question: That is pretty much what Block is suggesting anyway right?

Block, responding: Yes I think invariably it needs to be studied, so I am happy with Jones' reformulation of this.

Hudson takes the vote, without objection, the motion carries.

The final version of **C4** now reads: The Governor should recommend a comprehensive review of the number and nature of arrestable offenses in Virginia law and that this review should recommend reductions in the number of arrestable offenses where the findings may warrant.

- **C5:** Request a JLARC study of police *law-enforcement* militarization.

Hudson asks for a motion.

Hanken, question: Do we want to state our goal on this one as well? I liked what you said on the last one, so "request a JLARC study on law enforcement



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militarization and recommend steps to reduce such militarization wherever reasonable.’

Hudson calls for a second. Jamison seconds the motion.

Block: Would it be more specific to say the word appropriate rather than reasonable?

Hanken amends her motion to replace "reasonable" with "appropriate".

Hudson calls for the vote. Hearing no objections, the motion carries.

The final language of **C5** now reads: Request a JLARC study of law enforcement militarization and recommend steps to reduce such militarization wherever appropriate.

- **D1:** Study and reallocate state and local law enforcement funds
- **D2:** Incentivize ‘Early Warning System’ pilot programs.
- **D3:** Adjust law enforcement training requirement.
- **D4:** Encourage diversity in law enforcement.

Hudson asks if the Commission is fine with taking these as a package and the group affirms. The group agrees.

Chambers, comment: These largely track with what the Association of Chiefs of Police are suggesting as well.

Hudson calls for a motion. Jamison moves to adopt all and Mehta seconds. Hudson calls the question, Motion passed unanimously on roll call vote.

The Commission moves to a general discussion. Hudson asks for any other commentary.

Jamison, comment: Notes that she has experience with ride-along programs and that these programs are good to do and valuable tools to use. Perhaps the Commission can also add support for ride-along programs in the proposal.

Hudson: Notes that she agrees with the value of the programs, asks for a particular proposal.

Block, comment: I have a suggestion about how we communicate our recommendations to the Governor. I can imagine that the letter might look like a specific list of recommendations, but it also might be worth having a paragraph that talks about practices. We are weighing in on policy and structure, but culture is



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incredibly important too. It might be worth having a paragraph that we endorse and support any efforts to improve community-police relations and culture change in departments. That might also capture things we have heard from public commenters about things like ride-along programs and the value of local practices.

Hudson, comment: That is an excellent idea as either a lead-in to the letter or as a closing to the letter. Offers to write this paragraph in the proposal.

Chambers, comment: Part of the suggestion on adding diversity to law enforcement, when folks view police as part of the community, it is easier to get people to join the force as well.

Hudson, comment: In terms of next steps, with this meeting today, we are closing out the work on our policing reform recommendations. We are going to continue in the criminal justice category overall; my expectation is that our next meeting moves on to other criminal justice proposals that Block presented to us in May. After that, we will move on to education.

Block, question: as a procedural matter, we want the letter to go quickly I imagine, but we also want the commissioners all on board. Are we permitted to have staff send it around or do we need a public meeting?

Hudson, response: I think we can do it just like the interim report, in a way that is compliant with FOIA. Jessica affirms this.

6. Adjournment

Hudson closes the meeting at 3:23.