

# ADDENDUM

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TO: The Commission to Examine Racial Inequity in Virginia Law

FROM: Andrew Block (Vice-Chair), Kelsey Massey, Juliet Buesing, Christopher Yarrell, Wes Williams, Trust Kupupika, and Jessie Ames

RE: Policing Recommendations for Commission's Consideration - Proposals

DATE: July 1, 2020

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## INTRODUCTION

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This memo is a follow-up to the memo submitted to the Commission on June 15, 2020 and summarized and presented to the Commission at its most recent meeting on June 17, 2020. In this memo we provide 15 specific areas of legislative recommendation: five proposals addressing data, five proposals addressing accountability, and five proposals addressing ways to reduce the risks of policing. For each recommendation we provide a brief summary of the legislative concept. We then include a note on fiscal impact to the Commonwealth's budget, based on what we anticipate from the statute's design.

We also, at the end of the memo, detail other potential policy recommendations that would require legislative or budgetary action.

## LIST OF RECOMMENDATIONS

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### A. **Data Collection and Transparency**

1. Require local law enforcement data reporting on uses of force, pedestrian stops, all civilian complaints (in addition to motor vehicle stops and excessive force complaints)
2. Amend officer-involved shooting report requirement to include brief narrative and demographic information about victim
3. Establish a public, free database of downloadable data elements
4. Enact an enforcement mechanism for local agency data reporting requirements
5. Repeal FOIA exemptions that protect police personnel records

### B. **Accountability**

1. Mandate and empower regional civilian review boards to investigate and address complaints of misconduct
2. Create civil liability for profiling (either disparate impact or intentional), expand profiling protections
3. Provide for decertification of officers based on misconduct or dishonesty
4. Require the Attorney General's office to investigate and prosecute criminal allegations against law enforcement officers
5. Strengthen civil liability & limit sovereign and qualified immunity exemptions for police misconduct

### C. **Reduce the Risks of Policing**

1. Mandate the adoption of, and certain requirements for, local use of force policies
2. Add additional community members to the DCJS Training Committee
3. Ban no-knock warrants ("Breonna's Law")
4. Reduce arrestable offenses
5. Study police militarization

### ***Other Topics & Non-Legislative Change***

1. Study and reallocate policing funds
2. Incentivize 'Early Warning System' pilot programs
3. Adjust police training requirements
4. Encourage diversity in law enforcement

## A. DATA AND TRANSPARENCY

### 1. Expand Virginia’s new Community Policing Act to require local law enforcement data reporting on uses of force, pedestrian stops, all civilian complaints

**EXPLANATION:** Many citizens encounter police on the streets rather than in their vehicles. If we only require data on motor vehicle stops, we may neglect other instances of racially disparate policing. We suggest adding data collection on pedestrian stops to the existing language from the Community Policing Act (CPA), as well as language that would require the collection of demographic data and narrative information regarding any use of force, as well as language that requires the collection of all other civilian complaints, which may not involve force but may include complaints of unjustifiable stops or searches, harassment, or profiling.

**ANTICIPATED FISCAL IMPACT:** To achieve the goals of this statute, significant funds will need to be invested in building a viable data system. Some of that investment has already occurred this year, with the first iteration of the Community Policing Act, but we anticipate this bill to have further costs.

### 2. Amend officer-involved shooting report requirement to add brief narrative and demographic information about victim

**EXPLANATION:** Virginia currently collects data from police departments on any officer-involved shootings and reports it in the annual “Crime in Virginia” report, under Virginia Code § 52-28.2. However, the data reported is often difficult to translate into effective accountability, because it includes no narrative explanation and contains very little information. We encourage the Commission to recommend more detailed reports in order to improve data collection and analysis, such as requiring narrative details and the involved citizen’s demographic data, in order to improve data collection and analysis.

**ANTICIPATED FISCAL IMPACT:** This statute should have very little fiscal impact, as it builds on a data collection format that already exists, and the number of incidents on which data is collected is relatively small.

### 3. Establish a free, public database of downloadable data elements

**EXPLANATION:** The Community Policing Act makes great strides in improving statewide collection of data and therefore improving transparency in policing. But under the CPA, this data still goes solely to the Department of Criminal Justice Services and Virginia State Police. It only gets reported out to the public on an annual basis, in a report in which analysis has already been conducted and conclusions already drawn. Researchers strongly recommend improving public

## A. DATA AND TRANSPARENCY

trust, law enforcement research, and police accountability by allowing the public to download and work with police department data themselves.

**ANTICIPATED FISCAL IMPACT:** To achieve these goals,, additional funds for the Community Policing Act will need to be directed to building a platform that can securely connect to the VSP database and make certain data downloadable for the public.

### **4. Enact an enforcement mechanism for data reporting requirements**

**EXPLANATION:** A study from one Virginia newspaper estimated that approximately a third of Virginia police-involved shootings go unreported every year, despite a statutory mandate that local law enforcement agencies report them to the state.<sup>1</sup> We propose that the Commission recommend adding an enforcement mechanism to both incentivize appropriate data-collection, and hold accountable those agencies that fail to follow statutory requirements.

**ANTICIPATED FISCAL IMPACT:** Little to none.

### **5. Repeal Freedom of Information Act (FOIA) exemptions that protect police personnel records**

**(2 proposed elements)**

- a) Inactive criminal records involving law enforcement officers
- b) Personnel & disciplinary records for police departments

**EXPLANATION:** Due to broad records protection laws created by FOIA exemptions, Virginians have been effectively barred from accessing internal affairs investigative files, personnel files, and nonactive criminal investigative files about law enforcement officers. As a result, Virginia police are generally exempt from ordinary government oversight. We propose removing FOIA exemptions for inactive criminal records in which law enforcement was the subject of the investigation, as well as personnel and disciplinary records for law enforcement.

**ANTICIPATED FISCAL IMPACT:** Law enforcement agencies will be responsible for answering more FOIA requests as a result of this legislation, which may require additional staff or resources. The Commonwealth may choose to augment their assistance for localities, but otherwise this will not impact the Commonwealth's budget.

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<sup>1</sup> [https://www.newsadvance.com/news/local/virginia-police-departments-fail-to-report-nearly-one-in-three-police-shootings/article\\_cd23f28c-9145-5f85-a1d2-8af429733292.html](https://www.newsadvance.com/news/local/virginia-police-departments-fail-to-report-nearly-one-in-three-police-shootings/article_cd23f28c-9145-5f85-a1d2-8af429733292.html)

## B. ACCOUNTABILITY

### 1. Mandate and empower regional civilian review boards to investigate and address complaints of misconduct (4 main proposed elements)

- a) Mandated regional boards
- b) Subpoena power
- c) Appointment and nomination processes
- d) Pre-determined Disciplinary Matrix

**EXPLANATION:** As discussed at the June 17<sup>th</sup> meeting, while there are a range of opinions on their value, many advocates and organizations are currently calling for the mandatory creation of local civilian complaint review boards (CCRBs) with investigative, auditing, and/or disciplinary authority across the Commonwealth. At the June 17<sup>th</sup> meeting, the Commission, when discussing this issue, focused on the value of citizen engagement and the need for full-time professional staff if CCRBs were to be successful. While recognizing that there are costs and benefits to any approach, both in terms of fiscal impact and community value, we propose the establishment of regional CCRBs with professional staff, subpoena power, authority to investigate civilian complaints, and pre-established agreements with local law enforcement agencies to make disciplinary recommendations based on the outcomes of those investigations.

**ANTICIPATED FISCAL IMPACT:** There will be costs on local police departments to respond to subpoenas with witness testimony and document requests. The anticipated expense is significant.

### 2. Create civil liability for profiling; expand profiling protections

**EXPLANATION:** Virginia's Community Policing Act includes a ban on profiling on the basis of race and ethnicity, as well as age and gender. Virginia should enumerate even broader protections for disability, sexual orientation, and gender identity. Further, Virginia should ensure that its profiling law is properly enforceable. Racial profiling laws, when enforceable,<sup>2</sup> can provide important rights to people who are left behind by gaps in federal constitutional enforcement. While the Community Policing Act (§ 52-30.1 through 30.2) is a good start for Virginia, additional provisions should be added to make the ban enforceable, such as creating explicit civil liability for officers or departments who illegally profile civilians.

**ANTICIPATED FISCAL IMPACT:** It is possible that additional civil cases will be filed in the courts each year based on this new provision, but it is unlikely to be enough to create an impact on the Commonwealth's budget. Like the other recommendations that create civil liability, the most significant cost will be in civil judgments against officers and localities who have violated the law.

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<sup>2</sup> While a majority of states have racial profiling bans, only Kansas and Rhode Island provide for a civil liability enforcement mechanism, which is considered most effective. Rachel Harmon, *The Law of the Police* (forthcoming textbook). Other states, such as California and Arkansas, have strong definitions and training programs. *SPLC*.

## B. ACCOUNTABILITY

### 3. Provide for decertification of officers based on misconduct or dishonesty

**EXPLANATION:** Current Virginia statute provides for the decertification of officers who fail to complete training requirements, who are found to use drugs, or who are convicted of certain crimes. It does not provide for the decertification of officers who have been found to violate department policy or regulations, or who have a record of misconduct or integrity violations. We propose that the Commission also consider recommending that decertification also take place when officers engaged in serious misconduct, or demonstrate dishonesty and lack of integrity.

**ANTICIPATED FISCAL IMPACT:** Little to none.

### 4. Require the Attorney General's office to investigate and prosecute criminal allegations against police officers

**EXPLANATION:** Currently, criminal allegations against a police officer are handled by the local prosecutor, who may personally know the involved officer and whose investigation, and prosecution (if any), will be tainted, at a minimum, by the appearance of bias, if not actual bias itself. This prevents full accountability. While prosecutors can recuse themselves, it would be wiser and appear fairer for Virginia to adopt a statewide policy on these investigations. Campaign Zero suggests a permanent "Special Prosecutor's Office" at the state level for cases of police violence. This separate office would be especially important for incidents that meet a certain standard, such as police killings and non-fatal shootings, or any application of force that causes serious injury or death. The staff who handle such cases should be competent and immune from politics; one avenue is to require the state-level prosecutor to be a classified employee and to require investigators to have experience working on violent crime.

An alternative proposal offered by some is to require that prosecutions of local law enforcement be handled by prosecutors from different jurisdictions than the officer.

**ANTICIPATED FISCAL IMPACT:** This bill will likely require hiring a few staff members for the Attorney General's Office. Since the workload of local prosecutors' offices will decrease by the same amount that the AG's workload is increasing, it's possible that funds can simply be redirected.

### 5. Strengthen civil liability and limit sovereign and qualified immunity exemptions for police misconduct (3 levels of change)

## B. ACCOUNTABILITY

- a) Override immunity defense in officer misconduct cases, define personal tort liability for officer misconduct; enact civil rights duties
- b) Define tort liability for municipalities/departments regarding officer misconduct
- c) Amend Virginia sovereign immunity legislation

**EXPLANATION:** While sovereign immunity protection for municipalities and the Commonwealth is not currently codified, Virginia courts enforce the defense vigorously. Likewise, qualified official immunity for municipal employees is broadly applied. Virginia courts have complicated the matter by interpreting § 8.01-195.3 as legislative intent to absolve the Commonwealth from vicarious liability for torts or other violations committed by law enforcement officers. Currently, the legal standards determining when to allow a sovereign or qualified immunity defense are inconsistent and highly deferential. We propose, accordingly, that the Commission consider recommending some form of specific legal liability for law enforcement officers, police departments, and the cities or towns that operate them to ensure that abuses of force, physical violence, and intentional tortious actions are met with accountability when an officer abuses their power or when their employer fails to properly hire, train, and fire officers accordingly. We also proposed that the Commission consider recommending legislative language establishing specific civil rights language that is currently lacking in Virginia's Constitution. In other states, this language might be enforceable through a state version of §1983 (a federal law),<sup>3</sup> but in Virginia, these rights would need statutory enumeration first.

**ANTICIPATED FISCAL IMPACT:** Like the other bills that impose civil liability, this bill will have little effect on the Commonwealth's budget. The greatest expense will be in civil judgments against officers and localities who violate the law.

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<sup>3</sup> For example, the recent legislation in Colorado provides a remedy similar to § 1983 based on violations of Colorado's state constitution. Virginia does not have a similar constitutional section.

## C. REDUCE RISK OF POLICING

### 1. Mandate the adoption of certain requirements for local use of force policies

**EXPLANATION:** We propose that the Commission recommend legislation requiring DCJS to create a model Use of Force policy for distribution to local law enforcement agencies, and requiring all local law enforcement agencies and the state police to adopt a use of force policy. The recommended legislation should also include specific mandatory requirements for such local policies such as bans on chokeholds and strangleholds, required warnings before shooting, required withdrawal of force once the threat has abated, and a duty to intervene and stop excessive force by fellow officers. It should also include a prohibition of the use of force to execute non-violent felony arrests or nonviolent misdemeanor arrests where circumstances don't present imminent threat of harm to life or limb, as well as a limitation on the use of deadly force to prevent escape for nonviolent offenses.

**ANTICIPATED FISCAL IMPACT:** Little to none. The cost of drafting a model policy is minimal. The cost of the mandate on local departments to adopt and publish their policy is also minimal.

### 2. Add additional community members to the DCJS Training Committee

**EXPLANATION:** Under current law, the membership of the Training Committee is dominated by members of traditional law enforcement and representatives of the criminal justice system. Only one "citizen representing community interests" is present. Adding more diverse voices to the training committee will improve the reflection of community priorities in training law enforcement officers.

**ANTICIPATED FISCAL IMPACT:** Little to none.

### 3. Ban "no-knock" warrants ("Breonna's Law")

**EXPLANATION:** The recent shooting of Breonna Taylor, an EMT asleep in her own home, by plain-clothes police officers, has drawn national attention to the problem of the so called 'no-knock warrant.' We propose that the Commission recommend limiting the use of such warrants.

**ANTICIPATED FISCAL IMPACT:** Little to none. Though the changes in this statute may require a more costly form of policing in terms of officers' time, the risk reduction should save money on civil judgments and insurance costs. Regardless, this bill would not affect the Commonwealth's budget.



## C. REDUCE RISK OF POLICING

### 4. Reduce arrestable offenses

**EXPLANATION:** Like no-knock warrants, arrests risk substantial harm of injury and indignity, often for offenses that do not justify this risk. Scholars increasingly argue that many arrests are unnecessary to promote public safety, even when criminal charges may be appropriate as sanctions. In fact, arrests often happen on a racially disproportionate basis. Requiring certain low-level offenses to be met with a summons rather than arrest avoids the physical risks of a forceful encounter and encourages police officers to focus their authority on more pressing risks to public safety. The Commission could either recommend that specific offenses receive such treatment or recommend that an entity such as the Crime Commission examine and recommend that a specific list of such offenses, which are both frequently occurring and do not pose a risk to public safety, receive such treatment.

\*Note: It may be useful, at some point in the future, to provide an avenue by which civilians can fulfill the requirements of these summons *without having to go to court*. Court attendance is very difficult for working class members of our public, who have to arrange childcare and take time off work. More progressive jurisdictions have provided more convenient ways to make amends to the public, such as online payment of tickets. Such a system would require more collaboration with the Virginia court system.

**ANTICIPATED FISCAL IMPACT:** Little to none (unless the court system decides to adopt an online-payment system per the note above). In fact, a summons is significantly cheaper than an arrest. This change may save the Commonwealth and localities money.

### 5. Study police militarization

**EXPLANATION:** We propose that the Governor request the Joint Legislative and Audit Review Commission to study the issue of the militarization of police in Virginia. The Governor could also, by Executive Order, direct the Department of Criminal Justice Services to engage in such a study but we have concerns about their capacity to complete such a study in a short period of time given the other considerable demands they currently face.

## OTHER TOPICS & NON-LEGISLATIVE CHANGES

### 1. Study and reallocate police funding (further discussion required)

- a) Study police budgets
- b) Establish mental health crisis response programs
- c) Increase funding for housing, drug treatment, and youth programs
- d) End, or limit, school resource office programs and divert those funds to mental health professionals in schools

### 2. Establish 'Early Warning Systems' (pilot program incentives in state budget)

Early Warning Systems are highly effective local law enforcement programs that flag problem officers early in their careers before terrible things happen. This change would be best expressed as a budget item to establish several pilot programs in localities across the state.

### 3. Make training adjustments (regulatory change<sup>4</sup>)

The detail required in adjusting the state's law enforcement training regime is likely not best positioned in legislation, nor is it best handled by non-experts.

### 4. Encourage diversity in law enforcement (no change recommended):

**EXPLANATION:** While improving the diversity of police departments to mirror their communities is a logical goal, we do not recommend the commission pursue this as a priority. At least one study has suggested that improving diversity in the long run and having officers of color in high-ranking positions may have benefits and may help change the culture of law enforcement and reduce police violence against individuals of color.<sup>5</sup> However, there is also research that suggests more diverse entry-level hiring does not reduce police violence, change police culture, or create the structural reforms this memorandum otherwise pursues. For example, a 2004 study conducted by the National Research Council found that diverse hiring did not result in different interactions with the public "simply because of race or ethnicity."<sup>6</sup> Cities such as Baltimore have more officers of color than the relative percentage of the population, but this alone has not changed the aggressive policing issues and public distrust in the community.<sup>7</sup> Some theorize that the issues in Baltimore stem from the fact that the bulk of their officers are not from the communities they police. Empirical studies vary as to the benefits of hiring more officers of color but, perhaps most importantly, public perception is that hiring more black police officers is not enough and instead structural reforms are needed.<sup>8</sup> One study found that hiring more black

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<sup>4</sup> See 6VAC20-30-30: <https://law.lis.virginia.gov/admincode/title6/agency20/chapter30/section30/>

<sup>5</sup> <https://time.com/5858739/police-shootings-race-chief/>

<sup>6</sup> <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/08/22/does-diversifying-police-forces-reduce-tensions>

<sup>7</sup> *Id.*

<sup>8</sup> <https://msutoday.msu.edu/news/2020/is-hiring-more-black-officers-the-key-to-reducing-police-violence/>

## OTHER TOPICS & NON-LEGISLATIVE CHANGES

police officers only worked to reduce the number of black citizens killed in police interactions once there was a large proportional shift in hiring; a critical mass of police officers of color is needed to be hired into a predominately white police department to make a change.<sup>9</sup> The 21st Century Policing Report recommended increased diversity in hiring but focused mainly on a diversity of personalities and experiences that would lead to unbiased policing.<sup>10</sup>

We recommend focusing change, for now, on the aforementioned policy solutions that have stronger proof of reducing police violence and creating systematic changes. The other changes presented in this document have greater evidence supporting their abilities to effect structural improvements. Based on the studies of improved diversity within police departments, it is our recommendation that the Commission wait to consider a diversity proposal until a later date.

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<sup>9</sup> Sean Nicholson-Crotty, Jill Nicholson-Crotty, and Sergio Fernandez, *Will More Black Cops Matter? Officer Race and Police-Involved Homicides of Black Citizens*, Public Administration Review, 2017.

<sup>10</sup> [https://cops.usdoj.gov/pdf/taskforce/taskforce\\_finalreport.pdf](https://cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf)