

**REPORT TO THE COMMISSION ON MENTAL
HEALTH LAW REFORM**

***From the Mental Health Training and
Implementation Task Force***

August 5, 2009

PREFACE

The Commonwealth of Virginia Commission on Mental Health Law Reform (“Commission”) was appointed by the Chief Justice of the Supreme Court of Virginia, the Honorable Leroy Rountree Hassell, Sr., in October 2006. Commission members include officials from all three branches of state government as well as representatives of many private stakeholder groups. The Commission was directed by the Chief Justice to conduct a comprehensive examination of Virginia’s mental health laws and services and to study ways to use the law more effectively to serve the needs and protect the rights of people with mental illness, while respecting the interests of their families and communities. Goals of reform include reducing the need for commitment by improving access to mental health services, avoiding the criminalization of people with mental illness, making the process of involuntary treatment more fair and effective, enabling consumers of mental health services to have greater choice regarding the services they receive, and helping young people with mental health problems and their families before these problems spiral out of control.

During the first phase of its work, the Commission was assisted by five Task Forces charged, respectively, with addressing gaps in access to services, involuntary civil commitment, empowerment and self-determination, special needs of children and adolescents, and intersections between the mental health and criminal justice systems. In addition, the Commission established a Working Group on Health Privacy and the Commitment Process (“Working Group”). Information regarding the Commission and Reports of the Commission and its various Task Forces are all available at <http://www.courts.state.va.us/programs/cmh/home.html>

Based on its research and the reports of its Task Forces and Working Groups, the Commission issued its *Preliminary Report and Recommendations of the Commonwealth of Virginia Commission on Mental Health Law Reform* (“Preliminary Report”) in December, 2007. The Preliminary Report, which is available on-line at http://www.courts.state.va.us/cmh/2007_0221_preliminary_report.pdf, outlined a blueprint for comprehensive reform (“Blueprint”) and identified specific recommendations for the 2008 session of Virginia’s General Assembly that focused primarily on the commitment process.

After the General Assembly enacted a major overhaul of the commitment process in 2008, the Commission moved into the second phase of its work. Three new Task Forces were established – one on Implementation of the 2008 Reforms, another on Future Commitment Reforms and one on Advance Directives. In addition, the Commission created a separate Working Group on Transportation. Each of these Task Forces and Working Groups presented reports to the Commission, together with recommendations for the Commission’s consideration.

In December, 2008, the Commission issued a Progress Report reviewing its work in 2008 and providing a status report on the progress of mental health law reform in Virginia during 2008. It summarized the changes adopted by the General Assembly in 2008, reviewed the steps taken to implement them, summarized the available data on the operation of the commitment system during the first quarter of FY2009, presented the Commission's recommendations for consideration by the General Assembly in 2009, and identified some of the important issues that the Commission will be addressing in the coming year. The 2008 Progress Report can be found at http://www.courts.state.va.us/programs/cmh/2008_1222_progress_report.pdf

During 2009, the Commission focused on implementation and refinement of the reforms adopted during 2008 and 2009 and on several key issues that had been deferred, including the length of the emergency hospitalization period (the "TDO" period) and the possible expansion of mandatory outpatient treatment. The Commission also continued to study ways of enhancing access to services in an integrated services system. Its Progress Report for 2009 can be found at http://www.courts.state.va.us/programs/cmh/2009_progress_report.pdf. The Commission plans to complete its work in 2010.

The accompanying Report, dated August 5, 2009, represents the views and recommendations of the members of the Task Force on Training and Implementation, and should not be construed as reflecting the opinions or positions of the Commission on Mental Health Law Reform, the Chief Justice, the individual Justices of the Supreme Court of Virginia, or of the Executive Secretary of the Supreme Court. The Commission's recommendations are set forth in its Progress Report for 2009. Any recommendations or proposals embraced by the Court itself will lie exclusively within the judicial sphere.

Richard J. Bonnie, Chair
Commission on Mental Health Law Reform
December 2009

INTRODUCTION

This Task Force was assembled initially in December of 2007 as an ad hoc group of several stakeholders in the mental health law reform effort to coordinate legislative advocacy efforts during the 2008 General Assembly Session. The goal of the Task Force was to bring together members of the several agencies and interest groups who were also participants in the Chief Justice's Commission on Mental Health Law Reform, to review and discuss draft legislation and to provide a united voice, as appropriate, on the proposed reforms. The efforts of this Task Force in 2008 were regarded as highly successful, and there was strong consensus that the Task Force should be reconstituted to continue its work for the 2009 General Assembly Session. In addition, the Task Force participants found that they represented the same agencies and organizations that ultimately would be responsible for providing training and program implementation oversight to their constituencies. Hence, the Mental Health Legislative, Training and Implementation Task Force was constituted and recognized as a regular Commission Task Force.

During the 2009 General Assembly Session, the Task Force worked diligently to advocate for the Commission's package of legislative proposals, as well as to respond to other legislative proposals affecting mental health treatment and the involuntary commitment process.. Task Force members met with Delegates and Senators, attended legislative committee meetings and hearings, prepared and submitted position papers and talking points, drafted language for proposed amendments, and offered testimony to the legislative committees considering the proposed legislation. The Commission's legislative package included eleven bills for the 2009 Session, ten of which successfully

passed. The Commission also monitored the progress and supported or opposed several other mental health related bills, four of which complimented the Commission's legislative package and were enacted into law.

Once the Session concluded, as it did after the 2008 legislative session, the Task Force continued to meet regularly to monitor implementation of the new mental health law reforms, and to coordinate training efforts and the preparation of training materials to facilitate implementation of the new reforms. The Task Force has met three times since the General Assembly adjourned: April 16, 2009, May 5, 2009 and June 24, 2009. At these meetings, the Task Force has assisted in organizing and planning numerous training events for all the stakeholders in the commitment process, including special justices, magistrates, clerks of court, district court and juvenile court judges, CSB personnel and law enforcement. Task Force members collaborated to author an article providing an excellent summary and overview of the new advance directive statute that has since been published in *The Virginia Lawyer's Weekly*, the *Virginia Lawyer* (the magazine of the Virginia State Bar), and other trade publications and periodicals. The Task Force also has continued to coordinate with the various stakeholder groups to determine whether any implementation issues have arisen as a result of the new legislation. A detailed summary of all these activities follows.

2009 General Assembly Session

The 2009 General Assembly session was very productive for mental health law reform. Ten of the eleven bills recommended by the Commission were enacted into law.

Below is a summary of the bills that passed that were recommended by the Commission, as well as a summary of the bills that passed that were not specifically recommended by the Commission, and the bills that failed.

Civil Commitment “Clean Up Changes” - Effective February 23, 2009 (Emergency

Clause): HB 2060 (Hamilton) /SB 1083 (Howell) (Commission Bill): This bill had an emergency enactment clause and was effective upon signature of the Governor on February 23, 2009. In addition, there were minor technical amendments to the bill amending Code § 19.2-182.9 (NGRI Custody) that became effective as emergency legislation on April 8, 2009. The following are the significant provisions of the clean-up bill:

1. Amends § 37.2-808 to reaffirm that the emergency custody period when a law enforcement officer takes a person into custody based on his own observations without the prior issuance of an ECO is up to 4 hours. The bill also makes clear that a magistrate may extend the 4 hour period of emergency custody for persons held in custody on the initiative of law enforcement (without the prior issuance of an ECO) for an additional 2 hours for good cause shown (this extension authority for law enforcement initiated custody was inadvertently omitted from the 2008 bill). Good cause includes the need for additional time to allow (i) the CSB to identify a suitable TDO facility or (ii) to complete a medical evaluation if necessary.

2. Amends § 37.2-815 to make clear that the independent examiner attending a civil commitment hearing shall not be excluded from the hearing when the court issues an order to exclude witnesses.

3. Makes clear that the employee or designee of the CSB attending the commitment hearing shall not be excluded from the hearing when the court enters an order to exclude witnesses.

4. Amends § 37.2-816 to specify that the preadmission screening report is required to be admitted as evidence and made a part of the record in a civil commitment hearing, and is not just “admissible” in the discretion of the court. The purpose of this provision is to ensure that this critical report is available for all subsequent proceedings, such as recommitments or outpatient treatment determinations.

5. Amends § 37.2-817 to make clear that while a representative or designee of the community services board that prepared the preadmission screening report is required to attend the commitment hearing, the actual CSB employee or designee in attendance need not be the same person who prepared the report.

6. Amends § 37.2-819 to give District Court Clerks additional time to fulfill their reporting duties under this Code section. This provision amends the law to require the clerk of court upon receipt to certify and forward to the Central Criminal Records Exchange (CCRE) as soon as practicable, but no later than the close of business on the next following business day, a copy of any order for involuntary admission to a facility or certification of any person who has been the subject of a TDO and subsequently agreed to voluntary admission. However, any order for mandatory outpatient treatment shall continue to be forwarded to the CCRE prior to the close of business on the day of receipt. This bill was requested by the District Court Clerks in order to address enormous difficulties encountered in attempting to comply with the “same day” CCRE reporting requirement for all commitment orders.

7. Amends § 19.2-182.9 to permit a judge, special justice or magistrate to extend the period of emergency custody for a person found not guilty by reason of insanity (NGRI) of a criminal offense who is on conditional release one time for an additional two hours for good cause. Good cause includes additional time 1) to permit the CSB to identify a suitable TDO facility or 2) completion of a medical evaluation.

Other Commission Recommended Bills

Effective July 1, 2009 :

HB 2061 (Hamilton)/SB 1122 (Lucas) (Commission Bill):

Establishes mandatory outpatient treatment procedures for minors similar to those for adults. One significant difference from the adult procedures is that follow-up hearings and monitoring of MOT orders shall only be done by J&DR Court judges, not special justices. This bill also amended § 37.2-808 and 37.2-809 to state that magistrates issuing ECOs and TDOs for juveniles must apply the juvenile commitment criteria. This bill was a recommendation of the Commission's Children and Adolescents Task Force, chaired by the Honorable Deborah M. Paxson, Judge, Virginia Beach Juvenile and Domestic Relations District Court.

HB 2460 (O'Bannon)/SB 823 (Cuccinelli) (Commission Bill):

Permits persons or providers other than law enforcement (such as family members, friends, CSB representatives, or other transportation providers) to transport persons under ECO or TDO, and those who have been committed. Establishes procedures for service of ECOs and TDOs and transfer of custody from law enforcement to an alternative transportation provider. This was a recommendation of the Commission's Transportation Task Force, chaired by Senior Assistant Attorney General

Jane Hickey, and was a major legislative priority for the Commission during the 2009 Session.

HB 2459 (O'Bannon)/SB 1076 (Howell) (Commission Bill):

Provides a consumer receiving mental health services with the right to have a person of his/her choice notified of his/her condition, location or transfer to another location, and requires the DBHDS Board to amend the Human Rights Regulations to so provide.

HB 2461 (O'Bannon)/SB 1077 (Howell) (Commission Bill):

Relaxes Virginia Health Privacy Act and HIPAA restrictions so health care providers may notify family members of a person's location and general condition under certain circumstances when the person is subject to civil commitment process, (i.e., when the person agrees to the notification, or when it is determined that notification is in the person's best interests).

HB 2486 (Ward)/SB 1079 (Howell) (Commission Bill):

Permits law enforcement transporting a person voluntarily outside his jurisdiction to take custody of person law enforcement initiated custody authority if such person revokes consent and custody and otherwise meets the requirements of the ECO statute.

SB 1078 (Howell) (Commission Bill):

Permits a special justice to collect, in addition to his fee and necessary mileage, any parking expenses, tolls and postage incurred in conducting commitment hearings. The House added an enactment clause providing that these costs would be absorbed by the Supreme Court's Involuntary Civil Commitment Fund.

SB 1081 (Howell) (Commission Bill):

Provides that a special justice serves at the pleasure of Chief Judge of circuit, rather than the Chief Judge who made the appointment. This amendment eliminates confusion over who had supervisory authority when a Chief Judge retired or the position rotated to a different judge.

SB 1082 (Howell) (Commission Bill):

Requires the Office of Executive Secretary of the Supreme Court to develop the petitions, orders and legal forms for custody, detention and involuntary admission. However, DMHMRSAS (DBHDS) retains the duty to develop the preadmission screening report, examination and other clinical forms.

SB 1142 (Whipple)/HB 2396 (Bell) (Commission Bill):

Creates a mental health advance directive and provides instructions for its use. Also will permit a health care agent to admit an incapacitated person, even over objection, to a mental health facility for up to 10 days if the person has authorized his/her agent to do so in an advance directive, under certain specified conditions. Will also permit a guardian to admit the person to a mental health facility for up to 10 days if the guardianship order specifically authorizes the guardian to do so after making other specified findings. This bill was a major priority for the Commission in 2009.

Bills Passed But Not Based on Commission Recommendations:

HB 2257 (Albo):

Permits judge or special justice to consider person's prior compliance or noncompliance with treatment when determining whether person is capable of accepting voluntary admission prior to the commitment hearing. Provisions in the original bill that

related to mandatory outpatient treatment following a period of inpatient hospitalization were struck from the bill.

HB 2300 (Caputo)/SB 1117 (Ticer):

Changes the name of DMHMRSAS to the Department of Behavioral Health and Developmental Services.

HB 1948 (Shuler):

Expands the list of professionals who may conduct independent examinations when psychiatrists and psychologists are unavailable to include licensed marriage and family therapists. These professionals will also be required to complete a certification program approved by DMHMRSAS (DBHDS).

SB 1294 (Edwards):

(Note - While the Commission did not recommend this bill for introduction in the 2009 Session, the Commission did support the bill in Committee). Authorizes the Department of Criminal Justice Services to establish CITs (Crisis Intervention Teams) throughout the Commonwealth from state and federal funds appropriated for that purpose. On May 20, 2009, Governor Kaine announced CIT grants for the following areas:

* Alexandria CSB	-	\$48,000.00
* Chesapeake CSB	-	\$26,122.00
* Henrico MHMRS	-	\$49,593.00
* Richmond BHA	-	\$50,163.00
* Valley CSB (Staunton)	-	\$26,122.00

Failed bills:

HB 2156 (Toscano)/SB 1080 (Howell) (Commission Bill):

Would have permitted the judge/special justice to limit attendance at a commitment hearing on motion of the respondent or his attorney only under specified conditions. This bill, which was supported by the Virginia Press Association, was defeated in the House Court of Justice Committee, with a 10 to 12 vote on the motion to report.

SB 825 (Cuccinelli): This bill was opposed by the Commission.

Would have permitted 3rd year law students to represent petitioners in commitment hearings without supervision by a licensed attorney.

SB 840 (Cuccinelli):

Would have authorized courts to order mandatory outpatient treatment following a period of involuntary inpatient admission.

SB 854 (Edwards):

Would have established 2 to 5 mental health courts in different jurisdictions around the Commonwealth.

SB 1303 (Hurt): This bill was opposed by the Commission.

Would have reversed the 2008 legislation that now requires the appointment of counsel for admission of objecting minors and GALs for commitments of minors to be mandatory, and made such appointments discretionary; would have required monitoring and follow-up orders for MOT for adults to only be handled by general district court judges, not special justices; and would have specified that special justices may record hearings digitally or electronically and store them under separate file names.

2009 Training Activities

At the conclusion of the General Assembly Session, the Task Force turned its attention to coordinating efforts to train the various stakeholders on the new laws. Much as they did in 2008, Task Force participants collaborated on the preparation of training materials and “cross-training” efforts so that all of those involved would receive similar information and advice for implementing the reforms. SAAG Jane Hickey, along with her colleagues Allyson Tysinger and Karen Walters, prepared Power Point presentations summarizing all of the major legislative initiatives adopted by the 2009 Virginia General Assembly, and these “master” Power Point presentation were used or incorporated into the training materials utilized in many of the training programs offered around the Commonwealth. Task Force members also provided comments to the Office of Executive Secretary’s Legal Research Department on the creation of new forms and revision of existing district court forms used in the involuntary commitment process.

Task Force members organized and participated or assisted in providing training materials for numerous training events in April, May and June of 2009, including for Law Enforcement personnel (at the Virginia Sheriffs’ Association annual meeting in April, 2009), CSB personnel (at the VACSB Annual Conference on May 5, 2009), special justices (on May 21, 2009 and May 28, 2009 in Richmond), court clerks and magistrates (in programs offered in several locations around the Commonwealth between June 2 and June 26, 2009), and district court and juvenile and domestic relations district judges (scheduled for August 10 and 11, 2009).

Members of the Task Force also implemented a new “regional” approach to training this year that appears to have been particularly effective. Five regional trainings were conducted, and all the participants and stakeholders in the commitment process were invited to these trainings. The Supreme Court authorized and encouraged judicial branch officers to attend the regional trainings, including district court clerks, magistrates, judges and special justices. Regional training programs were conducted on the following dates and locations:

- * June 5 - City of Richmond, Holiday Inn Koger
- * June 9 - Blue Ridge Community College
- * June 11 - Norfolk Workforce Development Center
- * June 15 - Fairfax Government Center
- * June 30 - New River Valley CSB

The Task Force found that having all the various stakeholders from a geographic region present in one room at the same time allowed the presenters to focus on issues relevant to the particular region and ensure that everyone had a common understanding of the new procedures. After the Norfolk program, one Magistrate wrote: “Thank you for an outstanding conference. One full day of specific, targeted information, all questions answered, and such a diverse group of people, which included: judges, special justices, magistrates, clerks of court, CMH directors, clinicians, law enforcement, etc. (of which all are an integral part of the ECO/TDO process), providing real world scenarios and real world solutions. I strongly recommend this conference continue and this diverse group is once again invited.” The Task Force believes that this regional approach is the most

efficient and effective means for addressing local program implementation issues, and should serve as a model for future mental health training efforts.

2009 - Implementation Issues

Now that most of the scheduled pre-July 1 training programs have been concluded, the Task Force is turning its attention once again to monitoring the implementation and effectiveness of the mental health law reforms adopted in 2008 and 2009. As before, the Task Force will solicit input from stakeholders and participants in the process to ascertain any problems that may be encountered, either as a result of drafting, interpretation, training or communication issues, and will development recommendations and if warranted, additional legislative proposals, to address these problems. Among the implementation issues carried over from 2008, and new issues arising as a result of the 2009 legislative changes that may require monitoring, include the following.

Medical Screening and Assessment Issues

The Task Force continues to hear reports that in some areas, there is a disconnect between emergency room and other physicians, and psychiatric and other admitting facilities, on the scope and need for medical screening and assessment before an individual may be admitted to a facility under a TDO or for other treatment. In early 2007, a work group was convened to create “Medical Screening and Assessment Guidance Materials” to provide some direction for physicians and facilities in order to promote consistency and cooperation in meeting this need. We are advised that these Guidance Materials were distributed to all relevant users at that time, but since then, the Guidance Materials have fallen out of use. The Guidance Materials remain available, and

are posted on the DBHDS Website, on the Mental Health Commission’s page under “Resources.” The Task Force recommends, however, that the Guidance Materials be re-examined and updated as may be needed, and re-circulated to all relevant users, including the constituents of the Medical Society of Virginia, the Psychiatric Society of Virginia, the College of Emergency Physicians and the Virginia Hospital and Healthcare Association. In addition, the Task Force believes that these issues involve regional nuances and communication gaps at the local level. Accordingly, the Task Force recommends that efforts be made to enhance communications at the local level among these constituent groups.

Communications Between CSBs and Emergency Room Physicians

The subject of communications between CSBs and Emergency Room Physicians was addressed by the Task Force in last year’s report. Initially, concerns related to CSB pre-screenings being sought for voluntary patients, and to the manner in which CSBs responded to law enforcement initiated custody. The Task Force concluded that these issues actually resulted from a lack of communication between these parties, and an insufficient understanding among the participants in the process about their respective roles and responsibilities. Accordingly, with assistance from the Commissioner of DBHDS, a series of “Roundtable Meetings” were convened to bring together these and other groups to address some of these issues. Attached to this report is a summary (in the form of an e-mail report from Jim Martinez) of the matters taken up at the most recent Roundtable meeting held on April 7, 2009. Notably, the group endorsed efforts to create a “habit and structure” of collaboration and collective efforts at problem solving. The

Task Force applauds this concept, and the continuing efforts of the Roundtable participants to accomplish these goals.

Other Ongoing Issues

- 12-Hour Notice to CSBs: The Task Force is informed that certain courts continue to have difficulty or decline to provide the required 12-hour notice of hearings to CSBs. The Task Force will continue to monitor this issue to determine if this is a problem, and if so, how it might be addressed.
- Shortage of Attorneys: The Task Force was informed that in some jurisdictions, particularly in rural localities, juvenile courts and special justices hearing juvenile cases are having a difficult time finding both appointed counsel and a guardian ad litem for each commitment hearing now that both are required by statute. The Task Force will continue to monitor this issue, and in the mean time will encourage the Virginia State Bar and Virginia CLE to offer additional programs calculated to increase attorney recruitment in this specialty.

Next Task Force Meeting

The next meeting of the Legislative, Training and Implementation Task Force is set for Wednesday, September 2, 2009, at 10:00 a.m. in the Supreme Court Building in Capitol Square, Richmond. We ask all Commission members and participants from other Task Forces to be vigilant and to let us know if there are any issues or concerns that warrant review or study by the Task Force. Please feel free to send an e-mail to message with any observations, concerns or suggestions to Greg Lucyk (glucyk@courts.state.va.us) or to Joanne Rome (jrome@courts.state.va.us).

Task Force Members

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The following staff of the Office of Executive Secretary are not members of the Task Force, however, they participate in the meetings and discussions in order to provide information but do not take a position on the proposals and recommendations offered by the Task Force:

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