

**Special Commission to Investigate and Study
the Impact of the Qualified Immunity Doctrine to the Administration of
Justice in the Commonwealth**

Final Report

January 4, 2022

Commission Membership^{1 2}

- **Representative Michael S. Day, Co-Chair;** House Chair of Joint Committee on the Judiciary
- **Senator James B. Eldridge, Co-Chair;** Senate Chair of Joint Committee on the Judiciary
- **Representative Sarah K. Peake;** Appointed by Speaker of House of Representatives
- **Representative William M. Straus;** Appointed by Speaker of House of Representatives
- **Senator Julian Cyr;** Appointed by Senate President
- **Senator Cynthia Stone Creem;** Appointed by Senate President
- **Representative Steven G. Xiarhos;** Appointed by House Minority Leader
- **Senator Bruce E. Tarr;** Appointed by Senate Minority Leader
- **Matt S. Reddy;** Vice President (District 3), Professional Fire Fighters of Massachusetts; Appointed by Governor Baker
- **Christopher Ryan;** President, New England Police Benevolent Association; Appointed by Governor Baker
- **Matthew Segal, Esq.;** Legal Director, ACLU of Massachusetts; Designee of Executive Director of ACLU of Massachusetts
- **Richard J. Sweeney, Esq.;** Designee of President of Massachusetts Bar Association
- **Paul R. DeRensis, Esq.;** Sherborn Select Board; Designee of Executive Director of Massachusetts Municipal Association
- **Ivan Espinoza-Madrigal, Esq.;** Executive Director, Lawyers for Civil Rights; Designee of President of NAACP New England Area Conference

¹ Subsection (b) of section 116 of Chapter 253 of the Acts of 2020 also required Governor Baker to appoint one additional member to this commission: a retired justice of the appeals court. Governor Baker did not make this appointment.

² For a record of commissioner votes on recommendations, please see Appendix A.

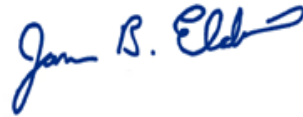
Note from Chairs

The Chairs wish to acknowledge and thank the work of their legislative staff who were instrumental in the work of the Special Commission on Qualified Immunity. In addition to their regular duties, the staff of the Committee on the Judiciary, among other work, drafted and compiled the minutes of all Commission meetings; created and maintained the public website; coordinated the logistics of all Commission Meetings; scheduled and worked with individuals making presentations to the Commission; greatly contributed to the drafting of the Final Report; and coordinated and tallied the final votes of the Commission.

The Special Commission could not have met its statutory charge without the dedication and hard work of Judiciary Staff Director Patrick Prendergast, General Counsel Dianna Williams and Research and Communications Director Jacqueline Manning, and Senate Chief of Staff Michael Carr and General Counsel David Emer.



Michael S. Day, Co-Chair
Special Commission on Qualified Immunity



Jamie Eldridge, Co-Chair
Special Commission on Qualified Immunity

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I. Statutory Charge

Section 116 of Chapter 253 of the Acts of 2020:

(a) There shall be established, pursuant to section 2A of chapter 4 of the General Laws, a special legislative commission to investigate and study the impact to the administration of justice of the qualified immunity doctrine in the commonwealth. Said investigation and study shall include, without limitation, an analysis of the origins of qualified immunity and its present interpretation by the courts of the commonwealth, and the legal and policy rationale for, and the legal and policy impact of, the qualified immunity doctrine in the commonwealth.

(b) The special legislative commission shall consist of 15 members: 2 of whom shall be the chairs of the joint committee on the judiciary or their designees, who shall serve as co-chairs; 2 of whom shall be members of the house of representatives appointed by the speaker of the house; 1 of whom shall be a member of the house of representatives appointed by the minority leader; 2 of whom shall be members of the senate appointed by the president of the senate; 1 of whom shall be a member of the senate appointed by the minority leader; 3 of whom shall be appointed by the governor, 1 of whom shall be a member of a police officers' union, 1 of whom shall be a member of a firefighters' union and 1 of whom shall be a retired justice of the appeals court; 1 of whom shall be the executive director of the American Civil Liberties Union of Massachusetts, Inc. or a designee; 1 of whom shall be the president of the Massachusetts Bar Association or a designee; 1 of whom shall be the executive director of the Massachusetts Municipal Association, Inc. or a designee; and 1 of whom shall be the president of the National Association for the Advancement of Colored People New England Area Conference or a designee.

(c) The special legislative commission shall submit a report of its study and recommendations, together with legislation, if any, to the clerks of the house of representatives and the senate on or before September 30, 2021.

Section 22 of Chapter 76 of the Acts of 2021:

Notwithstanding any general or special law to the contrary, the special legislative commission established in section 116 of chapter 253 of the acts of 2020 is hereby revived and continued to December 31, 2021. The special legislative commission shall file its report pursuant to subsection (c) of said section 116 of said chapter 253 with the clerks of the house of representatives and the senate not later than December 31, 2021.

II. Introduction

Qualified immunity is a legal doctrine that grants some government officials immunity from personal liability in certain civil lawsuits. The doctrine is most commonly invoked in civil rights actions brought pursuant to 42 U.S.C. §1983 and corresponding state laws. The United States Supreme Court has stated that “[q]ualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.” *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). The Supreme Court has interpreted §1983 to afford qualified immunity to people sued under that law who were acting under color of law, even though the law itself does not explicitly mention qualified immunity. Similarly, in Massachusetts, the Supreme Judicial Court has interpreted the Massachusetts Civil Rights Act to afford qualified immunity to people acting under color of law, even though the MCRA, too, does not explicitly mention qualified immunity. *Duarte v. Healy*, 405 Mass. 43, 47 (1989).

However, as calls for police reform have heightened across the nation in recent years, advocates have called for the review, reform and even elimination of qualified immunity, calling into question the efficacy of the doctrine in fairly balancing these two interests.

On December 31, 2020, the Commonwealth of Massachusetts enacted Chapter 253 of the Acts of 2020, entitled *An Act Relative to Justice, Equity and Accountability in Law Enforcement in the Commonwealth* and commonly referred to as the “Police Reform Law.” Section 116 of this Act created a 15-member special legislative commission to investigate and study the impact of the qualified immunity doctrine to the administration of justice in the Commonwealth. More specifically, the law required the study to include an analysis of the origins of qualified immunity, its present interpretation by Massachusetts courts, the legal and policy rationale for the doctrine and the impact of the doctrine on the administration of justice in the Commonwealth.

The Commission convened in April 2021 and met on nine occasions between April 20 and December 10.³ To ensure that it had sufficient time to fulfill its charge, the Commission requested and received a statutory extension⁴ of its reporting deadline from September 30, 2021, to December 31, 2021. As it was charged to do, the Commission reviewed the origin and legislative history of qualified immunity, studied the impact of the Police Reform Law on the doctrine in Massachusetts, reviewed recent legislation passed in other jurisdictions affecting qualified immunity, and welcomed public input through both oral and written testimony. As part of its work, the Commission accepted testimony, opinions and feedback from a host of individuals and groups, including but not limited to: academic experts Dean Erwin Chemerinsky of Berkeley Law and Professor Karen Blum of Suffolk University Law School; retired New

³ The Commission formally met on April 30, 2021, June 4, 2021, July 16, 2021, August 20, 2021, September 10, 2021, September 24, 2021, October 22, 2021, November 12, 2021, and December 10, 2021. Recordings of meetings may be found on the MA Legislature website, <https://malegislature.gov/Commissions/Detail/552/Members>. Agendas, minutes, written testimony and other materials submitted to the Commission may be found on the Commission website, <https://qicommissionma.com/>.

⁴ The Commission’s reporting deadline was extended to December 31, 2021, by *Section 22 of Chapter 76 of the Acts of 2021*.

Mexico Supreme Court Justice Richard Bosson, who led that state’s review of qualified immunity; Massachusetts attorneys Leonard Kesten and Luke Ryan, who practice in the area of civil rights litigation and often encounter the doctrine; law enforcement professionals from the Massachusetts Association for Professional Law Enforcement and Massachusetts Coalition of Police; and public interest advocacy groups such as the ACLU of Massachusetts, NAACP New England Area Conference, CATO Institute, Innocence Project, National Police Accountability Project, and Institute for American Police Reform. The following report represents a culmination of the Commission’s deliberations and findings that were informed from those discussions, presentations, supporting materials, testimony, and other documentation.

I. Qualified Immunity in Massachusetts

The Commission began by reviewing the origins of qualified immunity and its current application in Massachusetts under state and federal law. As part of this endeavor, the Commission welcomed presentations by nationally recognized scholars on the subject, Dean Erwin Chemerinsky of Berkeley School of Law and Professor Karen Blum of Suffolk University Law School, invited discussion between Massachusetts attorneys experienced in prosecuting and defending civil rights cases involving qualified immunity, Luke Ryan and Leonard Kesten, and reviewed testimony and other written materials submitted to the Commission by various individuals and organizations.

a. Civil Rights Actions in Massachusetts

The doctrine of qualified immunity is most frequently invoked as a defense in civil rights actions, so the Commission reviewed relevant federal and state civil rights statutes and caselaw.

The first iteration of the federal Civil Rights Act, originally referred to as the Ku Klux Klan Act, was enacted in 1871 to assist the government in combating racially motivated violence in the South after the Civil War. The modern analogue of that Act, 42 U.S.C. §1983 (“1983”), which was first enacted in 1979 and amended in 1996, provides individuals with a federal cause of action against public officials who violate their civil rights. Specifically, 42 U.S.C. §1983 states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia⁵, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...

Successful plaintiffs in these actions may recover compensatory damages and, in the court’s discretion, attorneys’ fees. 42 U.S.C. §1988(b). Punitive damages may be assessed if the defendant’s conduct is “shown to be motivated by evil motive or intent, or when it involves

⁵ Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971), held that a federal cause of action for civil rights violations exists against federal officials as well.

reckless or callous indifference to the federally protected rights of others.” Smith v. Wade, 461 U.S. 30, 56 (1983).

The Massachusetts Civil Rights Act, M.G.L. c. 12, §§11H-J (“MCRA”), was first enacted in 1979 and amended in 1982, 2014, and most recently in the Police Reform Law effective July 1, 2021. It provides individuals and the Attorney General with a state-based cause of action for injunctive or other appropriate relief:

Whenever any person or persons, whether or not acting under color of law, interfere by threats, intimidation or coercion, or attempt to interfere by threats, intimidation or coercion, with the exercise or enjoyment by any other person or persons of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth...

This relief includes compensatory damages for any aggrieved person or party, reasonable attorneys’ fees and litigation costs, and, if constitutional rights are interfered with, civil penalties not to exceed \$5,000 per violation. Id.

The Supreme Judicial Court has held that the MCRA is to be read in harmony with §1983, except in two respects. First, unlike the federal law, the MCRA protects against civil rights violations by both state actors and private individuals. M.G.L. c. 12, §11H (liability may attach to a person “whether or not acting under color of law”); Nelson v. City of Cambridge, 101 F. Supp. 2d 44 (D. Mass. 2000); Ayasli v. Armstrong, 56 Mass. App. Ct. 740 (2002); Bell v. Mazza, 394 Mass. 176 (1985). This difference means that under Massachusetts state law individuals can also sue other private individuals for deprivation of their civil rights.

Second, unlike §1983, to establish a claim under the MCRA a plaintiff must first show that the defendant interfered or attempted to interfere with his or her civil rights using “threats, intimidation, or coercion.” Doe v. Senechal, 66 Mass. App. Ct. 68 (2006). In this context, a “threat” is understood as the intentional exertion of pressure to make another fearful or apprehensive of injury or harm. Ayasli v. Armstrong, 56 Mass.App.Ct. 740, 750 (2002). “Intimidation” involves putting another in fear for the purpose of compelling or deterring conduct. Id. “Coercion” is the application to another of such force, either physical or moral, as to constrain that person to do against his or her will something he or she would not otherwise have done. Id. at 750-751.

Under this interpretation, a police officer’s direct violation of someone’s rights is not actionable under the MCRA unless it was accompanied by “threats, intimidation or coercion,” even if the direct violation of rights was egregious. For example, if a police officer were to be sued under the MCRA for allegedly shooting someone in violation of their civil rights, the officer could claim that the gunshot itself was not actionable, because it was a direct violation of rights, rather than a violation through “threats, intimidation or coercion.” See Longval v. Comm’r of Corr., 404 Mass. 325, 333 (1989) (“A direct violation of a person’s rights does not by itself involve threats, intimidation, or coercion and thus does not implicate the [MCRA].”). Thus, as Attorney Leonard Kesten noted in written testimony submitted to the Commission dated July

17, 2020, “[a]s a result of this heightened requirement, virtually all Civil Rights lawsuits brought against public officials [as opposed to private individuals] are currently litigated under §1983 in the federal courts.”

b. Qualified Immunity in Massachusetts before Police Reform Law

While §1983 and the MCRA do not explicitly provide qualified immunity as a defense, both federal and state case law has developed, adopted, applied, and upheld the doctrine.

The United States Supreme Court first recognized qualified immunity in Pierson v. Ray, 386 U.S. 547 (1967), originally describing it as a “good faith” defense for officers who violated the Constitution but believed they were appropriately following the law. The Supreme Court updated the qualified immunity test in 1982 in Harlow v. Fitzgerald, 457 U.S. 800 (1982). In Harlow, the Supreme Court held that “[p]ublic officials are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which [a] reasonable person would have known.” Id. At 818. This objective test does not hinge on whether the official acted in good faith. As noted above, the Supreme Judicial Court followed suit, applying this new standard to civil rights actions brought under the MCRA as well. *See* Rodrigues v. Furtado, 410 Mass. 878 (1991); Duarte v. Healy, 405 Mass. 43, 46 (1989).

Qualified immunity applies only to civil actions against individual public officials sued for money damages. It does not apply to actions brought against public entities, though public employers may be required to indemnify their employees in actions brought against employees individually for acts or omissions taken in the scope of their employment.⁶ While this doctrine most frequently appears in cases involving law enforcement, it also may be applied to local, state and federal officials. Qualified immunity is “an immunity from suit rather than a mere defense to liability.” Pearson v. Callahan, 555 U.S. 223, 231(2009). Accordingly, courts typically determine whether the doctrine applies as early as possible in a case in a motion to dismiss or motion for summary judgment.⁷ Id. However, qualified immunity can be raised at any point before the conclusion of a case.

A court will evaluate a claim of qualified immunity by determining: (1) whether the claimant has alleged deprivation of an actual constitutional right; (2) whether the right was “clearly established” at the time of the alleged action or inaction; and (3) if both questions are answered in the affirmative, whether an objectively reasonable official would have believed that the action taken violated that clearly established constitutional right. Ahearn v. Vose, 64 Mass. App. Ct. 403 (2005); Wilson v. City of Boston, 421 F.3d 45 (1st Cir. 2005). The Supreme Court

⁶ M.G.L. c. 258 §9-9A provides for the indemnity of public employees by their employers.

⁷ Since the question of qualified immunity is typically decided in a pre-trial motion to dismiss or motion for summary judgment, denial of its application is open to interlocutory appeal. The Commission heard testimony from the National Police Accountability Project on August 20, 2021, that interlocutory appeals are strategically used by defense counsel to delay and prolong actions, increase costs for plaintiffs, and coerce settlements. Attorney Leonard Kesten disagreed with the claim that interlocutory appeals are used inappropriately.

previously held in Saucier v. Katz, 533 U.S. 194, 201 (2001), that courts must first determine whether the defendant’s conduct violated a constitutional right before moving on to the second and third part of the inquiry; however, in Pearson v. Callahan, 555 U.S. 223, 236 (2009), the Court altered this doctrine. Under Pearson, a court can grant qualified immunity if it determines that the right in question was not “clearly established” at the time of the incident, without determining whether the defendant in fact violated that right. When courts take this approach, their decisions not only grant qualified immunity based on a view that the relevant right was not clearly established in the past, but also fail to clearly establish the relevant right going forward.

Whether a right is “clearly established” largely depends on whether case law has addressed the specific disputed issue or has sufficiently established the detailed contours of the right to make it indisputable that the public official’s conduct was illegal. Anderson v. Creighton, 483 U.S. 635, 640 (1987). To meet this requirement, the facts of the subject case must closely resemble the facts of the case relied on as precedent. As the CATO Institute noted in written testimony submitted to the Commission dated August 19, 2021, “[i]n practice that means, to overcome qualified immunity, civil rights plaintiffs generally must show not just a clear legal rule, but a prior case in the relevant jurisdiction with functionally identical facts.”⁸

“Clearly established” precedent, however, has not been adequately developed for a variety of reasons. First, as a result of Pearson v. Callahan, *supra*, courts are no longer required to determine whether a constitutional right was violated before disposing of a case through the application of qualified immunity.⁹ In other cases, where the plaintiff is aware of the difficulty of proving a “clearly established right,” he or she may choose to settle the case – or not bring one at all. Advocates for reform argue that this has led to unfair results that deprive victims of proper redress under the MCRA or §1983 for legitimate violations.¹⁰ The ACLU highlighted in written testimony submitted to the Commission dated August 20, 2021:

In fact, many victims of violent police misconduct and civil rights abuses never even seek justice because they know it will be futile. No matter how compelling the facts or egregious the violation of rights, if the officer can demonstrate that the law they violated was not “clearly established” at the time of the incident by another case involving nearly identical facts, the victim will likely lose. When the

⁸ This was the case for Michael LaChance, whose attorney, Hector Pineiro, testified before the Commission at its public input meeting. Mr. LaChance was seriously injured by law enforcement responding to his residence while he was having a seizure. His suit against the officers for negligence, assault and battery, and improper force was dismissed in part by a federal court in Massachusetts under the doctrine of qualified immunity because one of the violations was not “clearly established.”

⁹ While such a determination may not be binding precedent in future cases, it would certainly be considered by the court as persuasive precedent of a “clearly established” right.

¹⁰ Brody, Hardoon, Perkins & Kesten LLP argued, in written testimony submitted to the Commission dated August 19, 2021, that plaintiffs are not always left without recourse if qualified immunity is granted to bar a civil rights claim, as they can still move forward with criminal or other tort claims for certain underlying conduct, like assault and battery. The only difference, they stated, is that certain damages, like attorneys’ fees and punitive damages, cannot be recovered for basic tort claims.

circumstances have not been precisely the same, courts have blocked lawsuits even while acknowledging serious wrongdoing by the police.

Notably, attorneys Leonard Kesten and Luke Ryan and the Institute for American Police Reform, all agreed that if qualified immunity is to remain in any form, courts should again be required to decide whether the conduct complained of in a case violates an individual's civil rights, so "clearly established" precedent can be properly developed for all parties and public officials can have a better understanding of what conduct is improper.

c. Qualified Immunity in Massachusetts after Police Reform Law

On December 31, 2020, Massachusetts enacted Chapter 253 of the Acts of 2020, entitled *An Act Relative to Justice, Equity and Accountability in Law Enforcement in the Commonwealth* and commonly referred to as the "Police Reform Law." This sweeping legislation sought to increase training, oversight, accountability, and transparency to restore trust in law enforcement by, amongst other things, creating the Massachusetts Peace Officer Standards and Training Commission (POSTC), a centralized, majority-civilian board tasked with certifying officers, maintaining databases of training, certification, employment, and internal affairs records for all officers in the state, and investigating and adjudicating claims of misconduct. POSTC is empowered to enter orders requiring the retraining, suspension, or decertification of officers. *See* Section 30 of Chapter 253 of the Acts of 2020.

As part of this effort, the Police Reform Law, in Section 37, added a subsection (b) to G.L. c. 12, §11H of the MCRA, which specifies that qualified immunity will be unavailable to law enforcement officers who are decertified by the POSTC:

All persons shall have the right to bias-free professional policing. Any conduct taken in relation to an aggrieved person by a law enforcement officer acting under color of law that results in the decertification of said law enforcement officer by the Massachusetts peace officer standards and training commission pursuant to section 10 of chapter 6E shall constitute interference with said person's right to bias-free professional policing and shall be a prima facie violation of said person's right to bias-free professional policing and a prima facie violation of subsection (a). No law enforcement officer shall be immune from civil liability for any conduct under color of law that violates a person's right to bias-free professional policing if said conduct results in the law enforcement officer's decertification by the Massachusetts peace officer standards and training commission pursuant to section 10 of chapter 6E; provided, however, that nothing in this subsection shall be construed to grant immunity from civil liability to a law enforcement officer for interference by threat, intimidation or coercion, or attempted interference by threats, intimidation or coercion, with the exercise or enjoyment any right secured by the constitution or laws of the United States or the constitution or laws of the commonwealth if the conduct of said officer was knowingly unlawful or was not objectively reasonable.

This subsection explicitly provides that qualified immunity is not available as a defense to any civil rights claim brought under the MCRA for conduct taken by a law enforcement officer that results in decertification. However, as attorney Leonard Kesten, the ACLU, and several Commissioners opined, most conduct warranting decertification¹¹ of a law enforcement officer would likely also constitute a “clearly established” violation of law that a reasonable officer would know. They did concede, however, that if an officer is decertified, Section 37 may make a plaintiff’s burden of proof easier in such circumstances. Additionally, as attorney Luke Ryan, the ACLU, and several Commissioners noted, to avail him or herself of the benefit of this section, a victim would have to wait until the decertification process, including any appeal, is complete, which could take years.¹² The ACLU urged in written testimony submitted to the Commission that, “[v]ictims of violence should not have to wait for an administrative process to conclude before they can have their day in court.”

Importantly, the Commission noted that this provision likely will not apply to the majority of civil rights claims brought against law enforcement officers in Massachusetts, because, as a consequence of the “threat, intimidation or coercion” rule, those claims are mainly brought pursuant to §1983 in federal court. The Commission noted consistent testimony that the federal court would not be bound to accept the strictures of Section 37 with respect to the application of qualified immunity in anything other than an advisory capacity in a § 1983 claim. The Commission also noted, however, that federal courts have not decided a case involving the interpretation of Section 37 and, and accordingly, the Commission is not yet in a position to present any definite conclusions on federal interpretation of this state law.

The Commission also noted that, through the centralization of oversight, standardization of training, and updates to use of force policies, the Police Reform Law is designed to create a more transparent, accountable, lawful, and trustworthy police force. As the Massachusetts

¹¹ POSTC *must* revoke a law enforcement officer’s certification upon clear and convincing evidence of certain conduct, including, but not limited to, a felony conviction, obtaining certification through misrepresentation or fraud, falsifying evidence, using excessive force, using a chokehold, engaging in conduct constituting a hate crime, intimidating a witness, failing to intervene when another officer is engaging in prohibited conduct, or otherwise not being fit for duty as an officer and posing a danger to the public. *See* Subsection 10(a) of Section 30 of Chapter 253 of the Acts of 2020.

POSTC *may* revoke a law enforcement officer’s certification upon clear and convincing evidence of other conduct, including, but not limited to, a misdemeanor conviction, biased conduct based on race, ethnicity, sex, gender identity, sexual orientation, religion, mental or physical disability, immigration status or socioeconomic or professional level, exhibiting a pattern of unprofessional police conduct that the commission believes may escalate, and incurring repeated internal affairs complaints. *See* Subsection 10(b) of Section 30 of Chapter 253 of the Acts of 2020.

¹² The ACLU argued in its August 20, 2021, written testimony: “[T]o reap any possible benefit under the new scheme, a victim must wait for the POST commission to revoke an officer’s certification before seeking justice in the courts, and the decertification process will likely take years. Decertification can happen only after an investigation, which can be delayed for up to a year. Additionally, at the conclusion of the investigation the officer can request the suspension proceedings be delayed for another year. The lengthy process will compromise the victim’s opportunity to seek timely justice in the courts. Meanwhile, the victim or their family is left to bear the full cost of medical bills, funeral expenses, and the emotional trauma of experiencing state violence.”

Association for Professional Law Enforcement (“MAPLE”) urged in testimony submitted to the Commission and dated October 4, 2021:

The policies and actions of the newly established Police Officer Standards and Training Commission should be supported and given time for review and evaluation. The rules and regulations that the commission will promulgate over the course of time will inevitably help clarify conduct, performance, and responsibility. They will also assist in the removal of officers, who are unfit for duty. The courts should not be utilized as the primary agency for administering police discipline. Their primary focus should be the redress of specific injuries or damages.

II. Qualified Immunity in Other Jurisdictions

As part of its investigation, the Commission reviewed how other cities and states in the country have responded to public demand for the review and reformation of qualified immunity. The Commission reviewed recent laws passed in Colorado, New Mexico, Connecticut,¹³ New York City,¹⁴ Iowa,¹⁵ Arkansas,¹⁶ and California,¹⁷ and conducted an in-depth discussion on actions taken in Colorado and New Mexico, the states that recently imposed the most significant restrictions on the use of qualified immunity.

Colorado became the first state to statutorily limit the use of qualified immunity as a defense in state civil actions against law enforcement in SB20-217, enacted on June 19, 2020. This framework, which permits a civil cause of action against law enforcement for deprivation of civil rights or failure to intervene, explicitly prohibits the use of qualified immunity. Attorneys’

¹³ Connecticut’s legislation, HB 6004 enacted on or about July 31, 2020, expanded an existing state constitutional tort remedy which allowed individuals to sue police officers for violation of certain civil rights. The new law now applies to all civil rights and provides that immunity may only be granted if the officer “had an objectively good faith belief that their conduct did not violate the law.”

¹⁴ New York City passed a local law, INT-2220, on or about April 25, 2021, creating a local civil cause of action against NYPD and its employees for violations of the Fourth Amendment and prohibiting the use of qualified immunity as a defense.

¹⁵ Iowa’s legislation, Senate File 342 enacted on or about June 17, 2021, expanded and strengthened qualified immunity under state law to bring it more in line with federal law, by providing that a state employee will not be subject to liability for claims alleging deprivation of civil rights if: (a) the right, privilege, or immunity secured by law is not clearly established; and (b) it is not sufficiently clear that every reasonable employee would have understood that the conduct alleged constituted a violation of law.

¹⁶ Arkansas’ legislation, AR S494/Act 627 enacted on or about April 13, 2021, also significantly broadened qualified immunity under state law by: (a) granting all state and local employees, including law enforcement, immunity from liability and suit for damages except to the extent covered by liability insurance; and (b) providing that no political subdivision shall be liable for a tort action resulting from the acts of its agents and employees.

¹⁷ The Commission also notes that California enacted legislation, S.B. 2, on or about September 30, 2021, which eliminates certain immunity provisions for peace officers, custodial officers, and public entities employing peace officers or custodial officers, sued under the state’s civil rights act.

fees and costs may be awarded to successful plaintiffs *and* defendants of frivolous claims. This legislation also requires employer indemnification with a couple of exceptions. If the employer determines that the officer acted without a good faith and reasonable belief that his or her actions were lawful, then the officer is personally liable for 5% of the judgment or \$25,000,¹⁸ whichever is less. If the officer is convicted of a crime arising from the same conduct, indemnification is not required. However, if the officer is unable to satisfy a monetary judgment, the employer is responsible for damages.

New Mexico enacted the broadest restriction on the use of qualified immunity thus far on April 7, 2021, in HB 4, known as its Civil Rights Act.¹⁹ The Commission welcomed retired New Mexico Supreme Court Justice Richard Bosson, who chaired the Civil Rights Commission that recommended the legislation ultimately passed in New Mexico, to speak about the commission process, legislative history, and specifics of the law. This new legislation provides a civil cause of action against any public official (not just law enforcement) for deprivation of civil rights and wholly prohibits the use of qualified immunity as a defense. However, an individual may only bring claims against an employer²⁰ and liability is capped at \$2 million per claimant per occurrence. Attorneys' fees and costs may be awarded to a successful plaintiff in the court's discretion.

The Commission noted that, as with the changes made in the Commonwealth, there is insufficient information available at this time to determine the efficacy of legislative actions taken by other jurisdictions and that the impact of these changes should continue to be measured over time.

III. Rationale for Qualified Immunity

Qualified immunity has been described as a safeguard to protect public officials from liability for “judgment calls made in a legally uncertain environment.” Ryder v. United States, 515 U.S. 177, 185 (1995). The United States Supreme Court in Harlow v. Fitzgerald, 457 U.S. 800, 813–14 (1982), explained:

The resolution of immunity questions inherently requires a balance between the evils inevitable in any available alternative. In situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees. *Butz v. Economou, supra*, at 506, 98 S.Ct., at 2910;

¹⁸ The Commission also received testimony dated September 24, 2021, from Prymus Insurance, who launched a new Law Enforcement Liability Insurance product as of October 1, 2021. This was designed to fit the needs under the new Colorado law, would cover individual officers for \$25,000, and cost \$0.82 per day (\$25 monthly) with zero deductible.

¹⁹ Notably, before the Civil Rights Act, New Mexico state law did not provide a direct way for citizens to enforce their civil rights, as it did not have a state §1983 counterpart.

²⁰ Justice Bosson explained that part of the reason why actions can only be brought against employers is because they are responsible for properly training their employees. He stressed that public officials, including police, need to be given the ability to succeed if they are going to be held accountable for their actions, and a greater focus needs to be placed on funding and training.

see *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S., at 410, 91 S.Ct., at 2011 (“For people in *Bivens*' shoes, it is damages or nothing”). It is this recognition that has required the denial of absolute immunity to most public officers. At the same time, however, it cannot be disputed seriously that claims frequently run against the innocent as well as the guilty—at a cost not only to the defendant officials, but to society as a whole. These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will “dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.” *Gregoire v. Biddle*, 177 F.2d 579, 581 (CA2 1949), cert. denied, 339 U.S. 949, 70 S.Ct. 803, 94 L.Ed. 1363 (1950).

Through the course of its work, the Commission heard testimony from attorneys, law enforcement professionals and members of the public echoing the court’s justification in Harlow for the doctrine and advocating for the preservation of qualified immunity in some form, especially for law enforcement. They argued that weakening or eliminating qualified immunity will deter the best candidates from pursuing a career in law enforcement, as individuals will not feel comfortable working such a dangerous, high-pressure job without legal security for actions taken in good faith in uncertain circumstances. This could lead to a deterioration in the quality and character of law enforcement, which runs contrary to the heart of the police reform movement.

MAPLE concluded in written testimony provided to the Commission dated August 20, 2021:

[W]e wish to note that the police service both here and nationally is experiencing serious problems with regard to retention and recruitment of officers²¹. This could have serious ramifications over time. The conditions under which officers work have been cited as a contributing cause to this situation. Exposing them to any expanded risk of personal liability²² will inevitably have the effect of deterring

²¹ MAPLE’s written testimony cited various studies supporting its assertion that law enforcement is experiencing significant staffing shortages following recent instances of misconduct and calls for reform. This includes a study from the Police Executive Research Forum (PERF), one of the nation’s foremost advocates for police reform, finding 63% of the nation’s police have experienced declines in personnel since 2019. MAPLE opined that this sharp decline was caused by the “triple threat” of low applications for employment, early retirement, and resignations.

However, early data collected by the Colorado Peace Officer Standards and Training Board following the state’s passage of its law reforming qualified immunity “does not show any significant change in the number of peace officers leaving their jobs in 2020 and instead shows a decline in attrition.” Elise Schmelzer, “*Did Colorado law enforcement flee the profession in 2020? Depends on the department.*” The Denver Post (March 8, 2021), <https://www.denverpost.com/2021/03/08/colorado-police-sheriffs-leaving-2020/>.

²² UCLA School of Law Professor Joanna C. Schwartz argued in testimony submitted to the commission dated August 18, 2021, “People argue qualified immunity is necessary to protect officers from personal financial liability. But I studied police misconduct lawsuit settlements and judgments in 81 law enforcement agencies across the

competent candidates from stepping forward to take up the badge. It is they who hold the key for meaningful future police reform.

The Massachusetts Coalition of Police (“MCOP”) voiced similar concerns in written testimony submitted to the Commission dated August 19, 2021, and further argued that eliminating qualified immunity will put both officers and the public at greater risk, stating:

The concept is far greater than the practice, but the practice is necessary for the entire concept to work. If a police officer finds himself/herself in a split-second life or death encounter, that officer must rely on his/her training and make split-second decisions. The timing of the decision can compromise the safety of not only the officer, but anyone else involved in the situation. Qualified immunity allows the officer to respond to a threat in a timely fashion, and if they are acting in good faith and in accordance with their training, they are shielded from civil liability. If an officer must stop and weigh every single element and option available, it is likely that they or someone else will be injured or killed in the process.

Additionally, MAPLE argued that, contrary to advocates’ claims, qualified immunity does not act as a barrier to justice, as dismissals under the doctrine are rare in practice. MAPLE cited several studies to support its argument, including a 2017 study by UCLA Law School Professor Joanna C. Schwartz published in *Yale Law Review*²³, finding that qualified immunity resulted in a dismissal in only 3.9% of cases where the defense was raised. However, this statistic does not take into account the fact that many civil rights claims are settled or may not be brought at all if there is a chance that qualified immunity will apply. Therefore, the 3.9% is a significant underestimate of the negative consequences of the doctrine.

In its written testimony, the law firm of Brody, Hardoon, Perkins & Kesten LLP argued that “[q]ualified [i]mmunity protects officials whose actions were lawful based on the state of the law at the time they acted, or, where the law was not so clearly established as to put a reasonable person on notice that their actions were unlawful.”

Contrary to these positions, the CATO Institute, the ACLU, and UCLA School of Law Professor Joanna C. Schwartz all contended in their written testimony that qualified immunity is

country—including Boston—and found that police officers virtually never pay anything from their pockets in these cases.”

Attorney Kesten, during his discussion with the Commission, stated: “Officers, whether you have qualified immunity or not, that should not change in terms of the personal liability of the police officers. It should not be any different, whether there’s qualified immunity or not...I don’t think it’s going to be an issue for the officers. I’ve certainly been around telling police organizations and police officers ‘Take a deep breath. You’re not going to lose your house.’”

²³ Schwartz Joanna C., “*How Qualified Immunity Fails*”, *Yale Law School Review* (2017); <https://www.yalelawjournal.org/article/how-qualified-immunity-fails>.

not needed to protect public officials acting reasonably and in good faith because those individuals are already protected under the Constitution in such circumstances. The CATO Institute argued the following:

The doctrine of qualified immunity only matters when a public official has, in fact, violated someone’s federally protected rights. This means that if a police officer has not committed any constitutional violation, then by definition, they do not need qualified immunity to protect themselves from liability, because they have not broken the law in the first place. And the Supreme Court has made crystal clear that when police officers make good-faith mistakes of judgment—like arresting someone who turns out to be innocent, or using force that turns out to have been unnecessary—then they have not violated the Fourth Amendment at all, so long as they acted reasonably. In other words, deference to reasonable, on-the-spot decisions by police officers is already baked into our substantive Fourth Amendment jurisprudence, and qualified immunity is unnecessary to protect it. The cases where qualified immunity ends up making the difference are not cases where officers made reasonable mistakes of judgment, but rather cases where officers were acting in bad faith, but where a court simply had yet to address that exact scenario.

The ACLU argued that the underlying justification for qualified immunity is based on a legal fiction, as most public officials do not read case law to find out what is unlawful: “The notion that an officer doesn't know something is wrong unless there's a case on point, but does know it's wrong if there is a case on point they haven't read, is simply a fiction that is exploited by lawyers after-the-fact — and it is a dangerous fiction because it protects officers who wrongfully hurt people.”

IV. Impact of Qualified Immunity

The Commission received testimony from professors, scholars, attorneys, advocates, and members of the public outlining the impact of qualified immunity to the administration of justice, which mostly focused on its application to law enforcement.²⁴ The predominant theme was that qualified immunity, as currently applied under state and federal law, diminishes police accountability for legitimate civil rights violations which then erodes trust and confidence in law enforcement and acts as a barrier to justice for many victims.

The legal burden that plaintiffs must meet to defeat the application of qualified immunity, namely the “clearly established” requirement, has become so nuanced that public officials can be

²⁴ The NAACP New England Area Conference argued in written testimony submitted to the Commission: “It is much more important that we hold law enforcement officers accountable because we have granted them special authorities, policing power -- the right to arrest, to detain, and to use deadly force when the situation actually warrants it. This extraordinary power requires a much greater level of accountability, not less.” President Juan Cofield reiterated in testimony provided at the Commission’s public input meeting, “the NAACP is most concerned with holding law enforcement accountable and that's what drives our decision on qualified immunity.”

shielded from liability despite clear wrongdoing. The CATO Institute noted in their testimony to the Commission that “[a]lthough the Supreme Court has always purported to say that an exact case on point is not strictly necessary, it has also stated that ‘existing precedent must have placed the statutory or constitutional question beyond debate.’ And in practice, lower courts routinely hold that even seemingly minor factual distinctions between a case and prior precedent will suffice to hold that the law is not ‘clearly established.’”

For example, in Baxter v. Bracey, 751 F. App’x 869 (6th Cir. 2018), the court granted qualified immunity to two police officers who deployed a police dog against a suspect who had already surrendered and was sitting on the ground with his hands up. A prior case held that it was unlawful to use a police dog against an unarmed suspect lying on the ground with his hands at his sides. Despite the obvious similarities, the court found that case insufficient to overcome qualified immunity because “Baxter does not point us to any case law suggesting that raising his hands, on its own, is enough to put [the defendant] on notice that a canine apprehension was unlawful in these circumstances.” Id. at 872. In other words, prior case law holding unlawful the use of police dogs against non-threatening suspects who surrendered by laying on the ground did not “clearly establish” that it was unlawful to deploy police dogs against non-threatening suspects who surrendered by sitting on the ground with their hands up.

The CATO Institute further noted in their testimony that:

Given how the ‘clearly established law’ test works in practice, whether victims of official misconduct will get redress for their injuries turns not on whether state actors broke the law, nor even on how serious their misconduct was, but simply...whether the relevant case law happens to include prior cases with fact patterns that match their own. Perhaps most disturbingly, the doctrine can actually have the perverse effect of making it harder to overcome qualified immunity when misconduct is more egregious—precisely because extreme, egregious misconduct is less likely to have arisen in prior cases.

United States Fifth Circuit Judge Don R. Willett made note of this deduction in his concurring opinion in Zadeh v. Robinson, 902 F.3d 483, 498 (5th Cir. 2018), opinion withdrawn on reh'g, 928 F.3d 457 (5th Cir. 2019), stating that “[t]o some observers, qualified immunity smacks of unqualified impunity, letting public officials duck consequences for bad behavior—no matter how palpably unreasonable—as long as they were the *first* to behave badly.” Reform advocates also argued that, coupled with the fact that the “clearly established” precedent is underdeveloped and does not exist for many fact patterns (in part because judges are not required to determine whether a civil rights violation exists before disposing of a case based on qualified immunity), this burden seems almost insurmountable for most victims and discourages them from filing their claims in a civil action.

Advocates for reform of qualified immunity also contended that the lack of accountability provided by the doctrine has only exacerbated the deterioration of public trust and confidence in law enforcement, which has waned with each new instance of police abuse and misconduct over

the last few years.²⁵ In the opinion of these advocates, when law enforcement professionals believe they are above the law, they feel free to act excessively, knowing that they are unlikely to face repercussions. In a dissenting opinion, United States Supreme Court Justice Sonia Sotomayor, joined by Justice Ruth Bader Ginsburg, warned that qualified immunity “sends an alarming signal to law enforcement officers and the public. It tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished.” Kisela v. Hughes, 138 S. Ct. 1148, 1162 (2018)(dissenting opinion).

In the opinion of advocates for reform, this lack of accountability also acts as a barrier to justice for victims. Advocates argue that the “clearly established” requirement for qualified immunity has evolved into such an unfairly high burden for plaintiffs that many are dissuaded from pursuing claims, causing them to either settle for less than they deserve or fail to file a claim at all. This has resulted in only a small percentage of civil rights claims reaching judgment, which, in turn, further hinders the development of “clearly established” precedent and perpetuates a cycle of injustice.

V. Deliberations

Following the testimony, presentations, and discussions noted above, the Commission considered a variety of possible recommendations suggested by both the public and by Members of the Commission. The Commission held detailed deliberations over multiple sessions focusing on the following eight distinct categories of possible recommendations to the General Court:

- a. Continued evaluation of the implementation and administration of 2020 Police Reform Law, including its amendments to the Massachusetts Civil Rights Act, and the evaluation of recent qualified immunity reform in other jurisdictions before making further recommendations relative to the qualified immunity doctrine as applied in Massachusetts;
- b. Amend the Massachusetts Civil Rights Act to remove the “*threats, intimidation, or coercion*” requirement for claims against law enforcement officers only;
- c. Amend the qualified immunity standard by removing the “*clearly established*” requirement in actions brought against law enforcement officers only;

²⁵ The ACLU, in testimony dated August 20, 2021, contested claims that police misconduct does not happen in Massachusetts, stating that “[t]he Commonwealth is home to at least 200 incidents of police killings or other acts of violence within the last 20 years,” and citing the U.S. Department of Justice’s July 8, 2020, report finding that the Springfield Police Department’s narcotics bureau “engages in a Pattern or Practice of Unreasonable Force in Violation of the Fourth Amendment.” Press Release, Department of Justice, Justice Department Announces Findings of Investigation into Narcotics Bureau of Springfield, Massachusetts Police Department (July 8, 2020); <https://www.justice.gov/opa/press-release/file/1292901/download>.

- d. Amend the Massachusetts Civil Rights Act to change indemnification requirements in actions brought against law enforcement officers only;
- e. Expand the proposed changes in (b) - (d) above to apply to all public officials;
- f. Abolish the doctrine of qualified immunity;
- g. Provide victims of civil rights violations with further support beyond and/or apart from changes to the qualified immunity doctrine; and/or
- h. Require courts to make a determination of whether conduct violates an individual's civil rights even if the case is later disposed of by the application of qualified immunity.

After several lengthy and meaningful deliberations, members voted in favor of recommendations (a), (b), and (h), above. Accordingly, the Commission makes the following formal recommendations to the General Court based on its study of the impact of qualified immunity to the administration of justice in the Commonwealth.²⁶

VI. Recommendations

The Commission was unable to reach a consensus about whether to end qualified immunity, amend the qualified immunity standard, or leave the qualified immunity standard as it exists today. The Commission recommends continuing to evaluate the implementation and administration of the 2020 Police Reform Law in fostering transparency, accountability, and trust in law enforcement before recommending further substantive changes to the qualified immunity doctrine. The Police Reform Law became effective on July 1, 2021, and it will only be possible for legislators, scholars, attorneys, and advocates to understand and appreciate its impacts, including any impacts of police decertification on civil rights claims, after some time has passed. A two-year review period from the date this report is filed will allow interested parties to assess the implementation and impact of the 2020 amendments to the qualified immunity provision of the Massachusetts Civil Rights Act, as well as recent qualified immunity reform in other jurisdictions. Such a review can inform any future action by the General Court.

In the meantime, the Commission anticipates that the: (i) standardization of training standards and policies for all law enforcement in the Commonwealth; (ii) update of use of force policies to explicitly prohibit chokeholds and impose a duty to intervene; (iii) organization and centralization of training, certification, employment, and internal affairs records; and (iv) independent oversight by a centralized majority-civilian POSTC will result in more qualified, knowledgeable, and trusted law enforcement professionals, which will, in turn, increase public confidence in law enforcement.

²⁶ See Appendix A for the specific commissioner vote record.

The Commission also finds, however, that certain preliminary changes are needed to help effectuate the intent and purpose of the Police Reform Law and to better inform any future evaluation of the qualified immunity doctrine.

Therefore, the Commission recommends amending G.L. c. 12, §11H of the Massachusetts Civil Rights Act to remove the “*threats, intimidation, or coercion*” requirement for civil rights actions against law enforcement officers.^{27 28} The Commission finds that the “threats, intimidation or coercion” prerequisite has had the unintended effect of moving virtually all civil rights suits brought against law enforcement professionals to federal court, because they are often unable to succeed in state court. The Commission finds that the practical effect of this clause, with respect to bringing civil rights claims against law enforcement professionals, effectively eliminates a plaintiff’s right to seek redress in state court for violations of civil rights by police officers, especially rights guaranteed by state law. The Commission further finds that a claimant should not face a higher standard when bringing claims against a law enforcement professional under the MCRA as opposed to § 1983. Additionally, the Commission finds that there may be egregious civil rights violations of the MCRA that do not necessarily involve “threats, intimidation, or coercion,” as defined in case law. Victims of such abuses should be able to have their day in a court of the Commonwealth. The Commission finds that this change will align state civil rights law with federal civil rights law.²⁹ Additionally, the Commission believes that the removal of the limiting “threats, intimidation, or coercion” language contained in the MCRA with respect to law enforcement professionals will give full effect to Section 37 of the Police Reform Law.

The Commission also recommends that the General Court further amend the MCRA to require any court considering a claim for qualified immunity to make a determination about whether the alleged conduct in a case violates an individual’s civil rights, even if the court also determines that any violation did not violate rights that were “clearly established” at the time of

²⁷ The Commission’s review of the MCRA focused on law enforcement, so its recommendation is tailored accordingly. The Commission takes no position on whether the “threats, intimidation or coercion” requirement should be maintained or repealed as to civil rights violations by other government actors.

²⁸ Some members opined that proposing changes to the MCRA was beyond the scope of the Commission’s charge; however, a majority of the Commission finds that this recommendation is squarely within the statutory charge to the Commission, since qualified immunity is most commonly invoked in civil rights cases and the Commission was tasked with considering the impact to the administration of justice of the qualified immunity doctrine in Massachusetts.

²⁹ The Commission received testimony from Attorney Leonard Kesten noting that any modification to the MCRA, including removal of the “threats, intimidation, or coercion” requirement, would result in a monumental increase in actions filed against public officials, and thereby impose a significant financial burden on municipalities and other public employers required to defend such claims. However, a majority of the Commission found this concern less compelling than the benefit to the Commonwealth and its residents realized by giving full effect to the terms of the Police Reform Law. The Commission also recognized the contrary testimony offered by UCLA School of Law Professor Joanna C. Schwartz, who noted in her written testimony that “People argue cities might go bankrupt if qualified immunity is eliminated and they have to indemnify their officers. But my research shows liability costs make up well less than one percent of most governments’ budgets. In my study, I found that police misconduct payouts amounted to 0.17% of Boston’s budget.”

the incident. While this recommendation will not change the outcome of a particular case, it will allow “clearly established” precedent to develop, putting public officials on notice of improper conduct and allowing the “clearly established” prong to evolve and recognize changes in society and modern policing.

The Commonwealth enacted the Police Reform Law on December 31, 2020 in an effort to restore public trust in law enforcement and address deficiencies found in the law. This legislation, however, was not meant to be the end of the conversation. The Commission believes that removing the “threats, intimidation, or coercion” requirement of the MCRA and requiring that courts determine whether alleged conduct violates an individual’s civil rights will make the legal system more accessible to victims and ensure that bad actors are held accountable, while the General Court, law enforcement, POSTC, and the public continue to monitor the implementation of Police Reform and determine its effectiveness in improving the quality of law enforcement and restoring public confidence.

**Special Commission to Investigate and Study
the Impact of the Qualified Immunity Doctrine to the Administration of
Justice in the Commonwealth**

Appendix A
Commissioner Vote Record

Special Commission on Qualified Immunity

Final Report Recommendations

The Chairs separated the special commission’s recommendation into three distinct recommendations and members voted **YEA** or **NAY** on each. The specific recommendations and member votes are as follows:

1. The Commission recommends a two-year continued review of the implementation and administration of Chapter 253 of the Acts of 2020 (commonly referred to as "Police Reform Law"), which largely became effective on July 1, 2021, before recommending further substantive changes to the qualified immunity doctrine. Legislators, scholars, attorneys, and advocates will only be able to understand and appreciate its impacts, including the impact of Section 37, which bars qualified immunity for officers decertified by MPOSTC, after some time has passed. Such a review will inform any future action by the General Court.

YEA

Chair Day
Chair Eldridge
Commissioner Peake
Commissioner Straus
Commissioner Xiarhos
Commissioner Tarr
Commissioner DeRensis
Commissioner Sweeney
Commissioner Ryan
Commissioner Reddy

NAY

Commissioner Creem
Commissioner Cyr
Commissioner Espinoza-Madrigal
Commissioner Segal

2. The Commission recommends that the General Court amend G.L. c. 12, §11H of the Massachusetts Civil Rights Act to remove the “*threats, intimidation, or coercion*” requirement for civil rights actions against law enforcement officers.

YEA

Chair Day
Chair Eldridge
Commissioner Peake
Commissioner Straus
Commissioner Creem
Commissioner Cyr
Commissioner Espinoza-Madrigal
Commissioner Segal

NAY

Commissioner Xiarhos
Commissioner Tarr
Commissioner Sweeney
Commissioner Ryan
Commissioner Reddy
Commissioner DeRensis

3. The Commission recommends that the General Court amend the Massachusetts Civil Rights Act to require any court considering a claim for qualified immunity to make a written determination about whether the conduct alleged violates an individual's civil rights, even if the court also determines that qualified immunity attaches to the conduct alleged because it did not violate rights that were "clearly established" at the time of the incident.

YEA

Chair Day
Chair Eldridge
Commissioner Peake
Commissioner Straus
Commissioner Creem
Commissioner Cyr
Commissioner DeRensis
Commissioner Segal

NAY

Commissioner Xiarhos
Commissioner Espinoza-Madriral
Commissioner Sweeney
Commissioner Ryan
Commissioner Reddy

RESERVES RIGHTS

Commissioner Tarr

**Special Commission to Investigate and Study
the Impact of the Qualified Immunity Doctrine to the Administration of
Justice in the Commonwealth**

Appendix B
Meeting Minutes

Special Commission on Qualified Immunity Meeting Minutes
Friday, April 30, 2021, at 10:30 AM
(virtual meeting)

Commission Chairs Day and Eldridge opened the Commission meeting by welcoming members and providing brief opening remarks, then called the roll:

Commission Members Present:

- Michael S. Day
- James B. Eldridge
- Sarah Peake
- William Straus
- Julian Cyr
- Cynthia Creem
- Steven Xiarhos
- Bruce Tarr
- Matthew Reddy
- Christopher Ryan
- Matthew R. Segal
- Paul DeRensis
- Iván Espinoza-Madrigal
- Richard J. Sweeney

Following the call of the roll, Chair Day introduced Judiciary Committee staff and then provided a brief bio of each Commissioner.

The Commission reviewed the rules governing the Commission's meetings and Chair Day placed a copy of Joint Rule 29A on the screen for review. He then advised the Commission Members that the meeting had been formally noticed on the MA Legislature public website and was being recorded.

Chair Day invited a motion for the recording of future Commissions and posting on the Commission's public website. Senator Creem offered the motion, which Representative Peake seconded. After a roll call, the motion carried unanimously. The Commission agreed that materials received and discussed by the Commission at meetings will be made publicly available on the Commission's website and that the public would be allowed to provide materials privately to staff for the Chairs.

Chair Day then placed the public Commission website on screen for discussion and comment. The Commissioners were favorable to the website and expressed appreciation for the staff work in creating and maintaining it.

Chair Day noted the Commission's statutory reporting deadline of September 30, 2021 and the Commissioners agreed to reserve 10:00 AM on the last Friday of every month moving forward as a placeholder for future meetings.

Chair Eldridge then read the legislative charge to the Commission and shared the language of the charge on the screen. The Chairs noted their belief that a review of the statutory charge was important in order to keep focused on the actual work of the Commission and avoid drifting into areas beyond the charge.

Chair Day offered a summary of what he viewed as the five categories of the charge for discussion and consideration and placed a document listing these categories on the screen:

- Origins of Qualified Immunity
- Present interpretation of Qualified Immunity by courts in the Commonwealth
- Changes made to Qualified Immunity under most Police Reform Law
- Legal and policy rationale for Qualified Immunity
- Impact of Qualified Immunity to the administration of justice

Senator Creem opened the discussion and noted the recent work done in New York and other states in this area and suggested that the Commission should review that work. Senator Cyr supported that idea and specifically noted work done in Colorado and New Mexico. Chair Day noted that this work would be encompassed under the second category but that a specific subcategory could be added to include a survey of other states' treatment of qualified immunity. He also noted that the federal treatment of qualified immunity would fall under the first category.

Representative Peake stated that it would be beneficial to know whether there have been any legal challenges to newly enacted statutes and Chair Day agreed.

Commissioner Ryan asked that the Commission focus on Massachusetts and the issues we have here. He noted that Attorney Kesten wrote an opinion paper on qualified immunity in which he could not cite to any situation in Massachusetts where the wrongful conduct by police officers was protected by qualified immunity. He asked that if Commissioners know of any such case, it should be discussed here as well. Chair Day noted that this review would be encompassed by the fifth category as part of discussion on the impact of qualified immunity to the administration of justice. Chair Day stated that while the Commission's charge included a review of the doctrine, how it has evolved and what its present impact is here in Massachusetts, it is important to understand what other states are doing as part of this analysis as well.

Commissioner Segal stated that consideration must be given to the question what alternatives might exist as a means of deciding who should bear the cost of having their rights violated and that there might be different ways of allocating that. He suggested that it might be useful to separate out as a separate topic what the alternatives to qualified immunity are and whether they've been adopted by other states.

Commissioner DeRensis requested a copy of Attorney Kesten's opinion. Chair Day noted that the website will contain a repository of resources that Commissioners can populate and welcomed input.

Senator Cyr expressed his desire for public feedback and engagement and noted the racial makeup of the Commission. Chair Day stated that the Commission is going to be deliberate and conscious in making sure that every voice is heard in the presentations as well as by welcoming public input and feedback.

Chair Day asked for discussion on where the Commission wished to begin its tasks and suggested that the Commission solicit an expert presentation on the origins of qualified immunity. Chair Eldridge asked for recommendations of professors or scholars that were equipped to provide the Commission with an overview of the history of qualified immunity. Representative Peake suggested that the Commission look to local law schools for ideas. Representative Xiahros offered Attorney Kesten and noted that Attorney Kesten had personally represented Representative Xiahros in a qualified immunity claim and has firsthand experience in this field. Senator Creem favored focusing on scholars for the initial presentation. Commissioner Segal supported that position. Commissioner Espinoza-Madrigal also expressed support for a scholarly, objective review of the doctrine.

Chair Day noted agreement among the Commissioners and asked them to provide suggested names to the Chairs ahead of the next meeting. Commissioner Reddy noted that he would benefit from a foundational understanding of qualified immunity and build from there.

Commissioner DeRensis suggested incorporating into the presentation a review of both the origins of the doctrine and a review of the present interpretation in the courts. Commissioner Ryan agreed and underscored his desire to hear from an expert on these issues. Senator Creem agreed and suggested that two scholars could handle these issues in their presentations. Chair Day stated that it seemed like there was broad consensus to have objective presenters review the doctrine and related case law to provide a common base of knowledge for the Commission.

The Commission moved onto a discussion of scheduling. Chair Eldridge offered 10:00am on Friday, May 28 as the next meeting date and noted that minutes and an agenda would be circulated ahead of that.

Chairs Day and Eldridge thanked the Commissioners and entertained a motion to adjourn. The motion was made, seconded and unanimously approved, whereupon the Commission meeting was adjourned.

Special Commission on Qualified Immunity Meeting Minutes
Friday, June 4, 2021 at 1:00 PM
(virtual meeting)

Chair Eldridge opened the meeting, welcomed members, and made introductory remarks.

Chair Eldridge recognized Chair Day who gave introductory remarks and introduced his staff.

Chair Eldridge directed that a roll call of the Commission be taken.

Commissioners Present

- Chairman James B. Eldridge
- Chairman Michael S. Day
- Commissioner Sarah Peake
- Commissioner William Straus
- Commissioner Julian Cyr
- Commissioner Cynthia Creem
- Commissioner Steven Xiarhos
- Commissioner Matthew Reddy
- Commissioner Christopher Ryan
- Commissioner Matthew R. Segal
- Commissioner Paul DeRensis
- Commissioner Richard J. Sweeney

Commissioners Absent:

- Commissioner Bruce Tarr (Hirak Shah appeared on his behalf)
- Commissioner Iván Espinoza-Madrigal

Professor Erwin Chemerinsky of UC Berkeley provided a presentation on the history of qualified immunity and fielded questions from members.

Professor Karen Blum of Suffolk University gave a presentation on the history of qualified immunity in Massachusetts and fielded questions from members.

Chair Eldridge asked Commissioners to review the minutes from the April 30, 2021 meeting and offer edits or comments. Chair Eldridge entertained a motion to approve the minutes. Commissioner DeRensis moved, Commissioner Peake seconded. Commissioners unanimously approved.

The commission reviewed the statutory charge.

Chair Eldridge then opened the commission up to a discussion on potential topics for future meetings.

Commissioner Creem advised that her office shared some information with the Chair's office and that she has been working with NCSL on what changes made in other states.

Commissioner Straus requested a review of changes made to qualified immunity in the police reform law passed by the Legislature last year and a comprehensive summary of what other states have done.

Commissioner Segal offered his resources to help conduct the summary proposed by Commissioner Straus.

Chair Eldridge announced that a date had not yet been set for the next Commission meeting and that members would receive an email.

Commissioner Ryan said it is very important that the Commission hear from Attorney Lenny Keston to get his perspective as someone who has litigated many cases in Massachusetts courts. He encouraged the legislators on the commission to reach out to local civil service and police departments to hear that applications to become police officers are drastically down. He then offered further comment on the police reform law.

Commissioner Peake asked that prior to the next meeting that information be sent out to give the members an opportunity to digest the material. She said that information on what other states are doing would be helpful.

Commissioner Xiarhos said he would like the Commission to hear from Attorney Lenny Keston or someone else who has been in the courtrooms and seen it firsthand, how it works, and doesn't work.

Commissioner DeRensis suggested items for future meetings, including municipal insurance, liability, and indemnity.

Commissioner Reddy noted as a firefighter he felt the Commission needed to look at everyone involved and not just focus on police.

Chair Day offered closing remarks.

Chair Eldridge thanked everyone for their suggestions and participation, and ended the meeting.

Special Commission on Qualified Immunity
Friday, July 16, 2021, at 11 AM
(virtual meeting)

Commissioner Present:

- Chairman Day
- Chairman Eldridge
- Leader Peake
- Chairman Straus
- Senator Cyr
- Senator Creem
- Representative Xiarhos
- Commissioner Reddy
- Commissioner Ryan
- Commissioner Segal
- Commissioner DeRensis
- Commissioner Sweeney

Commissioners Absent:

- Senator Tarr (Hirak Shah attended as proxy)
- Commissioner Espinoza-Madrigal

Chair Day called the meeting to order. Commissioner DeRensis moved to accept minutes circulated for the June 4, 2021, meeting. Motion was seconded by Commissioner Creem and unanimously approved by members present.

Chair Day led a review and discussion of Chapter 253 of the Acts of 2020 (commonly referred to as “Police Reform Law”), as it relates to the qualified immunity doctrine. Commissioners expressed their differing opinions on the subject.

Chair Day then led a review and discussion of recent changes made to qualified immunity in New Mexico, Colorado, Connecticut, New York City, Iowa, and Arkansas. Chair Day welcomed Justice Richard C. Bosson, retired Justice of the New Mexico Supreme Court and Chair of the Civil Rights Commission, to discuss legislation recently passed in New Mexico.

The Commission reviewed the statutory charge, noting the reporting deadline of September 30, 2021. The Commission then discussed potential topics for future meetings, including welcoming input from members of the public and hearing from practitioners who have represented plaintiffs and defendants in qualified immunity cases in the Commonwealth.

Chair Day proposed the Commission next meet on Friday, August 20, 2021, at 11AM. Members agreed. Chair Day entertained a motion to adjourn the meeting. Chair Eldridge so moved, Commissioner Peake seconded, and it was unanimously approved by members present. Chair Day thanked everyone for their participation and ended the meeting.

Special Commission on Qualified Immunity
Friday, August 20, 2021, at 11:00 A.M.
(virtual meeting)

Commissioner Present:

- Chairman Eldridge
- Chairman Day
- Commissioner Peake
- Commissioner Straus
- Commissioner Creem
- Commissioner Xiarhos
- Commissioner Ryan
- Commissioner Segal
- Commissioner DeRensis
- Commissioner Espinoza-Madrigal
- Commissioner Sweeney

Commissioners Absent:

- Commissioner Cyr (Liz Ganz attended as proxy)
- Commissioner Tarr
- Commissioner Reddy

Chair Eldridge called the meeting to order, and he and Chair Day gave introductory remarks.

Chair Day moved to accept the minutes circulated for the July 16, 2021, meeting. Motion was seconded by Commissioner Xiarhos and unanimously approved by members present.

Chair Eldridge informed members that he and Chair Day discussed extending the report deadline of the Commission. Chair Eldridge asked for input and Commissioners offered comment.

Motion by Commissioner Peake to extend the report deadline of the Commission from September 30, 2021, to December 31, 2021. Motion was seconded and unanimously approved by members present.

Chair Eldridge began the public testimony portion of the meeting. Commissioners heard from various persons and organizations regarding the qualified immunity doctrine and its impact to the administration of justice in the Commonwealth.

Chair Eldridge noted that the next meeting would take place after Labor Day and would include presentations from Attorney Lenny Keston and Attorney Luke Ryan on their experiences with qualified immunity in the courtroom.

Chair Day and Chair Eldridge gave closing remarks and Chair Eldridge concluded the meeting.

Special Commission on Qualified Immunity Meeting Agenda
Friday, September 10, 2021, 10:00AM
(virtual meeting)

- I. Introduction/Roll Call
- II. Approval of Minutes from 8.20.21 Meeting
- III. Discussion with Practitioners
- IV. Review of Statutory Charge
- V. Discussion of Topics for Future Meetings
- VI. Schedule Next Meeting

Commissioners Present:

Chair Day
Chair Eldridge
Leader Peake
Senator Creem
Senator Cyr
Commissioner Ryan
Commissioner Segal
Commissioner DeRensis
Representative Xiarhos

Commissioners Absent:

Chairman Straus
Senator Tarr
Commissioner Espinoza-Madrigal
Commissioner Sweeney

Chair Day called the meeting to order and gave introductory remarks. This included an update on the status and process for extending the reporting deadline.

Chair Day invited a motion to approve minutes circulated for the August 20, 2021, meeting. No comments or edits were made. Motion made by Chair Eldridge, seconded, and unanimously approved by members present.

Chair Day began with a quick overview of what the commission has covered thus far.

Chair Day then introduced Leonard Kesten and Luke Ryan, who were invited to share their experience with qualified immunity as practicing attorneys. Attorney Kesten and Attorney Ryan each gave brief remarks and then engaged in an open discussion with the commission.

Chair Day scheduled the next hearing for September 24, 2021, at 11 am, and advised that it will include a debate and discussion amongst members about the topics covered in previous meetings and what the report should look like. Members requested an outline or framework before the next meeting. Chair Day invited members to send staff any topics or questions they would like covered during this discussion.

Chair Day gave closing remarks and moved to adjourn the meeting, which was unanimously approved by all members present. The meeting ended.

Special Commission on Qualified Immunity Meeting Minutes
Friday, September 24, 2021, 11:00AM
(virtual meeting)

Agenda:

- I. Introduction/Roll Call
- II. Approval of Minutes from 9.10.21 Meeting
- III. Open Discussion Amongst Commissioners
- IV. Review of Statutory Charge
- V. Discussion of Topics for Future Meetings
- VI. Schedule Next Meeting

Commissioners Present:

Chair Day
Chair Eldridge
Commissioner Peake
Commissioner Straus
Commissioner Creem
Commissioner Xiarhos
Commissioner Reddy
Commissioner Cyr
Commissioner Ryan
Commissioner Segal
Commissioner DeRensis

Commissioners Absent:

Commissioner Espinoza-Madriral
Commissioner Sweeney
Commissioner Tarr

Chair Eldridge called the meeting to order and gave introductory remarks.

Chair Eldridge invited a motion to approve minutes circulated for the September 10, 2021, meeting. No comments or edits were made. Motion made by Chair Day, seconded by Commissioner Xiarhos, and unanimously approved by members present.

The commission began by reviewing its statutory charge in Section 116(a) of Chapter 253 of the Acts of 2020 (commonly referred to as “Police Reform Law”).

The commission then moved on to an open discussion of qualified immunity in the Commonwealth, including the history of the doctrine, changes made under the recent Police Reform Law, legislation passed in other jurisdictions, the impact of qualified immunity to the administration of justice, and recommendations for the future of qualified immunity.

Chair Eldridge advised that the next meeting will take place on October 22, 2021, at 11 am.

Chair Eldridge gave closing remarks and welcomed a motion to adjourn the meeting, which was motioned by Commissioner Peake, seconded by Commissioner Segal, and unanimously approved by all members present. The meeting ended.

Special Commission on Qualified Immunity Meeting Minutes
Friday, October 22, 2021, 11:00AM
(virtual meeting)

Agenda:

- I. Introduction/Roll Call
- II. Approval of Minutes from 9.24.21 Meeting
- III. Review of Statutory Charge
- IV. Discussion of Recent SCOTUS Decisions
- V. Discussion of Possible Report Recommendations
- VI. Schedule Next Meeting

Commissioners Present:

Chair Day
Chair Eldridge
Commissioner Peake
Commissioner Creem
Commissioner Xiarhos
Commissioner Reddy
Commissioner Cyr
Commissioner Ryan
Commissioner Segal
Commissioner DeRensis
Commissioner Sweeney

Commissioners Absent:

Commissioner Straus
Commissioner Tarr
Commissioner Espinoza-Madriral

Chair Day called the meeting to order, gave introductory remarks, and advised members that the commission's report deadline has been extended to December 31, 2021.

Chair Day invited a motion to approve minutes circulated for the September 24, 2021, meeting. No comments or edits were made. Motion made by Commissioner DeRensis, seconded by Senator Cyr, and unanimously approved by members present.

The Commission began by reviewing the statutory charge for qualified immunity under Section 116(a) of Chapter 253 of the Acts of 2020.

Chair Day opened discussion about recent U.S. Supreme Court and MA Appeals Court cases regarding qualified immunity and reiterated the importance of the commission's charge.

Chair Day then opened discussion to members about possible commission recommendations, including making no further changes to qualified immunity at this time, amending the legal standard for qualified immunity under the Massachusetts Civil Rights Act in several different respects, and abolishing qualified immunity.

Chair Day advised that the next hearing would take place on November 12, 2021, at 11 am.

Chair Day gave closing remarks and welcomed a motion to adjourn the meeting, which was motioned by Commissioner DeRensis and unanimously approved by present committee members. The meeting ended.

Special Commission on Qualified Immunity Meeting Minutes
Friday, November 12, 2021, 11:00AM
(virtual meeting)

Agenda:

- I. Introduction/Roll Call
- II. Approval of Minutes from 10.22.21 Meeting
- III. Review of Statutory Charge
- IV. Continued Discussion of Possible Report Recommendations
- V. Discussion Regarding Drafting of Report
- VI. Schedule Next Meeting

Commissioners Present:

Chair Day
Chair Eldridge
Commissioner Straus
Commissioner Cyr
Commissioner Xiarhos
Commissioner Reddy
Commissioner Ryan
Commissioner Segal
Commissioner DeRensis
Commissioner Sweeney

Commissioners Absent:

Commissioner Peake
Commissioner Creem
Commissioner Tarr
Commissioner Espinoza-Madriral

Chair Eldridge called the meeting to order and gave introductory remarks.

Chair Eldridge invited a motion to approve minutes circulated for the October 22, 2021, meeting. No comments or edits were made. Motion made by Commissioner DeRensis, seconded by Commissioner Xiarhos, and unanimously approved by members present.

The Commission began by reviewing the statutory charge for qualified immunity under Section 116(a) of Chapter 253 of the Acts of 2020.

Members then engaged in a robust discussion about possible commission recommendations, including preserving qualified immunity as it currently exists in Massachusetts, abolishing qualified immunity altogether, and making certain changes to the qualified immunity doctrine and/or the Massachusetts Civil Rights Act.

The Commission then discussed preliminary drafting of a report for review and discussion at the next meeting. Chair Eldridge advised that the next meeting will be held on Friday, December 10, 2021, at 11am. Chair Eldridge gave closing remarks and the meeting ended.

Special Commission on Qualified Immunity Meeting Minutes
Friday, December 10, 2021, 11:00AM
(virtual meeting)

Agenda:

- I. Introduction/Roll Call
- II. Approval of Minutes from 11.12.21 Meeting
- III. Review of Statutory Charge
- IV. Continued Discussion of Possible Report Recommendations
- V. Discussion of Draft Report
- VI. Schedule Next Meeting

Commissioners Present:

Chair Day
Chair Eldridge
Leader Peake
Chairman Straus
Senator Creem
Representative Xiarhos
Commissioner Reddy
Commissioner Ryan
Commissioner Segal
Commissioner DeRensis
Commissioner Sweeney

Commissioners Absent:

Senator Cyr
Commissioner Espinoza-Madriral
Senator Tarr (Hirak Shah attended as proxy)

Chair Eldridge called the meeting to order and gave introductory remarks.

The Commission began by reviewing the statutory charge for qualified immunity under Section 116(a) of Chapter 253 of the Acts of 2020.

Chair Eldridge invited a motion to approve minutes circulated for the November 12, 2021, meeting. No comments or edits were made. Motion made by Commissioner DeRensis, seconded by Leader Peake, and unanimously approved by members present.

Chair Eldridge opened discussion about possible commission recommendations, including making no further changes to qualified immunity at this time, amending the legal standard for qualified immunity under the Massachusetts Civil Rights Act in several different respects, and abolishing qualified immunity.

The Commission next turned to discussion about creating and circulating the commission report. Discussion about votes and policies in the report were discussed along with the potential for extra meetings.

Chair Eldridge stated that the next meeting will be held on Friday, December 10, 2021 at 11am and will consist of drafting the commission report.

Chair Eldridge gave closing remarks, thanked the committee, and the meeting ended.