

Report of the Racial Disparities in the Criminal and Juvenile Justice System Advisory Panel

Submitted to the General Assembly in accordance with Act 54 of 2017

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This is the report of the Racial Disparities in the Criminal and Juvenile Justice System Advisory Panel. The Panel unanimously supports this report.

The report will provide recommendations in response to its legislative charge. It will include an overview of additional subjects discussed by the Panel that contain ideas for future action. It will also discuss the underlying causes of racial disparities.

Preamble

To speak of race - and furthermore of racial disparities - is to evoke discomfort for all, not simply for Caucasians, but also for People of Color. "Race" is a construct that divides us, and the impacts of institutional racism and racial bias are real, painful, and lead to disparate outcomes for People of Color in the criminal and juvenile justice systems - injustices antithetical to the mores of the State of Vermont. Racial minorities are oftentimes in the position of defending themselves against the practice not only of intentional racism, but also of biases that are so embedded in our common ways of being that many people - both Caucasians and People of Color - are absolutely unaware of the exercise of these selfsame biases. This entire process leads to rifts and tensions at best, and to physical violence at the worst. To dismantle a problem, one must be willing to name it, despite the discomfort it raises. Sadly, the terms that best describe not only the state of the country (including the state of the state) tend to alienate Caucasians who believe themselves to be possessed of the best of intentions in regard to racial justice. Despite their good intentions, their interventions may confirm their bias and cause more harm. The Advisory Panel on Racial Disparity in the Criminal and Juvenile Justice System (henceforth "the Panel") uses these terms manifestly *not* to provoke needlessly, but rather to characterize the truest nature of the problem that *all* Vermonters face, and those awful terms are "white supremacy" and "white privilege". These are terms that in their fullest essence describe not merely simple costuming and the burning of crosses, but rather a system of unequal human interaction that causes great and real pain to Vermonters. We call upon all persons of good will to do their best to rise above feelings of discomfort, alienation, and pain to address white supremacy and white privilege and their effects.

As a whole, the Panel recognizes that the breadth of its mandate is reflected in the breadth of the problem of white supremacy and privilege. The legal scholar and critical race theorist Frances Lee Ansley speaks of this problem thusly:

By "white supremacy" I do not mean to allude only to the self-conscious racism of white supremacist hate groups. I refer instead to a political, economic, and cultural system in which whites overwhelmingly control power and material resources, conscious and unconscious ideas of white superiority and entitlement are widespread, and relations of white dominance and non-white subordination are daily reenacted across a broad array of institutions and social settings.

In short, we speak of a social order, in place for many centuries, which causes damage not only to People of Color, but also to various Caucasians who, at the same time, benefit in some ways from the privilege that it confers. It is a system that we have all been part of, either consciously or unconsciously. It lives in all people and institutions regardless of individual desire, belief, or comprehension.

Recommendations

This section provides recommendations in response to the three questions posed by 3 V.S.A. § 168(f)(6), enacted by Act 54 of 2017. We address them in order.

When we reference systems of state government in this section, we are discussing the criminal and juvenile justice systems. These may include, but are not limited to, entities such as the Department of Children and Families, the Department of State's Attorneys and Sheriffs, the Department of Corrections, the Attorney General's Office, the Office of the Defender General, and the Judiciary.

A. Section 168(f)(6)(A): How to institute a public complaint process to address perceived implicit bias across all systems of State government.

The panel believes that the Human Rights Commission (HRC) is the appropriate place to house a public complaint process to address implicit bias across all systems of state government. The HRC is already charged with investigating complaints of discrimination in housing, public accommodations, and state government employment. Adapting the HRC to be the central clearinghouse for receiving, investigating, and resolving bias-related complaints, or referring them for resolution to the appropriate governmental agency or branch, is an approach that fits within the Commission's mission.

It is clear to the Panel, however, that the HRC as it is presently constituted is not adequately staffed to handle all such complaints. The Panel believes, in agreement with HRC leadership, that additional resources are needed to prioritize race-related bias complaints from across state government and resolve them in a timely manner. It is also clear to the Panel that outreach to various communities is needed, since the HRC is for many citizens an unknown structure of government. We feel that continued funding to support educational outreach and training is needed in order to make the HRC and its functions more accessible; this will help make the HRC a robust mechanism for handling public complaints. In short, the Panel feels that additional resources at the HRC concerning such outreach is necessary.

Finally, and in conjunction with the HRC, the Panel recommends resources for caseload coordination and mediation. These resources would be central to establishing the infrastructure necessary to handle complaints from across state government and re-direct or resolve them as appropriate. They would also follow up on the outcomes of these referred complaints and periodically publish data related to complaints and outcomes.

The Panel also recommends continued funding 211 so that the service can be utilized by the citizens of Vermont as needed, and not just during business hours. Between 11/1/18 and 10/31/19, 211 made 894 referrals to legal-related programs. There were five referrals to the Vermont Human Rights Commission in the same time period. Services referred to also included Constitutional/Civil Rights Groups, Housing Discrimination Assistance, and Education and

Outreach. The eighth most requested service that 211 provided during the year 2018 concerned legal aid and law enforcement. During the recent series of fora sponsored by the Attorney General's Office, many members of communities of color mentioned the need to have a service such as 211 to facilitate access to legal assistance. The Panel therefore recommends that the Legislature, in addition to creating a more robust Human Rights Commission, commit to continuing to fund this critical service which manifestly supports the needs of Vermont's minority communities.

B. Section 168(f)(6)(B): Whether and how to prohibit racial profiling, including implementing any associated penalties.

The Panel submits the following recommendations that it believes will act to mitigate racial bias in the criminal and juvenile justice process, and in so doing reduce racial profiling—whether intentional or implicit.

- Ensure that Vermont statutes track existing federal requirements with respect to due process for those with limited English proficiency. For example, expand the rights established in 1 V.S.A. §§ 337, 338 for Deaf and Hard of Hearing individuals to those who have limited English proficiency and require use of competent language interpreters as needed. Amend the scope of these statutes to include juvenile delinquency proceedings.
- Support the use of objective and simple screening tools by first responders, including 911 operators, to assess the need for mental health or substance abuse treatment and the involvement of behavioral health experts.
- Support the development and implementation of training designed to educate the public on their individual rights under federal, state, local laws and community traditions. The training should be focused on the people most affected by racial disparities and include training on where to report racially disparaging experiences.
- Implement and expand training for officers promoted into supervisory and managerial positions to ensure that people occupying those key law enforcement roles will hold all officers accountable on issues of race, racial disparities, cultural competency, and data collection. Continue and enforce high standards of training for *all* law enforcement officers to ensure cultural competency and education about issues related to race, racial disparities, cultural competency, race relations, and data collection.
- Expand and support the use of community policing approaches to law enforcement. Community policing encompasses a variety of philosophical and practical approaches to law enforcement, though at its core, it aims to bridge gaps between police and diverse communities in order to build trust and mutual understanding. The community policing model helps to break down barriers between law enforcement and the communities they serve, resulting in improved

information exchanges, more transparency, and less susceptibility for implicit biases to influence decision-making.

- The Panel did not adequately discuss associated penalties. The Panel will discuss this issue and present proposals in the future.

C. Section 168(f)(6)(C): Whether to expand law enforcement race data collection practices to include data on nontraffic stops by law enforcement.

The Panel spent a great deal of time on the issue of data collection. The Panel believes that data collection is a vital issue, and one that needs to be addressed early as we grapple with the challenges and the injustice represented by racial disparities.

This section begins with a summary of recommendations, followed by a discussion that elaborates upon those recommendations.

Summary of the Panel’s Data Collection Proposals:

- Increase data collection with respect both to court processes and administrative processes. Vermont should collect data that captures the high-impact, high-discretion decision points that occur during:
 - the judicial processes within the State’s Attorneys’ Offices, the Office of the Attorney General, the Office of the Defender General, and the Judiciary.
 - the administrative processes within the Department of Children and Families and the Department of Corrections.
 - charging, bail and pre-trial release, plea bargaining, sentencing, and the usage of alternative justice options such as diversion.
- Expand and improve data collection with respect to law enforcement.
 - Traffic stop data collection should be improved by providing resources for ensuring:
 - that the data is fully collected,
 - that the data is made fully available to the public more rapidly than it is at present,
 - that it is both collected and categorized consistently across the state.
 - Data collection should be expanded to include information about use of force incidents.
- The panel strongly urges a commitment to staffing and other resources to collect and compile data properly. This could include:
 - Creating centralized, statewide staffing with responsibility for assisting with data collection and compilation from police agencies and other entities across the state.
 - A focus on consistency, clarity, and accessibility of data across all data collection efforts.
 - Mechanisms to ensure accountability and compliance.

Discussion of Data Collection Recommendations:

The Panel agrees that increased and improved data collection is necessary to combat racial disparities in our criminal and juvenile justice systems. Our current data collection system is not sufficient to understand the reasons why our systems produce unequal outcomes on the basis of race. Available data does show, however, that disparate outcomes exist.

The Panel recommends developing laws and rules that will require data collection that captures high-impact, high-discretion decision points that occur during the judicial processes within the State's Attorneys' Offices, the Office of the Attorney General, the Office of the Defender General, and the Judiciary, as well as the administrative processes within the Department of Children and Families and the Department of Corrections. This will require staffing and monetary resources, and the Panel urges the legislature to provide these.

Although state law already requires data collection with respect to certain police interactions - specifically traffic-stop data - this process of collection should be improved and expanded. It should be improved by providing resources for ensuring that the data is fully collected, that it is made fully available to the public more rapidly than it is at present, and that it is collected and categorized consistently across the state. Data collection should be expanded to include information about use of force incidents.

All of these efforts would be aided by creating centralized staffing with responsibility for assisting with data collection and compilation from police agencies across the state. This would reduce the burden on individual agencies, while providing dedicated staff with adequate statistical training to assist many agencies from a central office. There should also be mechanisms in place for ensuring accountability and compliance. The Panel strongly recommends a focus on consistency, clarity, and accessibility of data across all data collection efforts. This consistency will be necessary for agencies and entities to work together and to understand how their areas of responsibility interact and potentially contribute to racially disparate outcomes. It will also allow for better public transparency and scrutiny from the Vermonters we serve.

A mandate to collect more data without the resources to aggregate and analyze the information will do little to address the data gap issue. When data are collected without a plan for their integration, aggregation, and analysis with other data sets, their usefulness is diminished. Any new data collection must be considered from a systems perspective and be informed by the principles of data governance—the best practices in handling data.

Further Discussion and Recommendations

This section provides the General Assembly with an overview of the Panel's extensive discussions about the challenges and opportunities we face in addressing racial disparities in the criminal and juvenile justice system. The Panel felt it important to include this section to ensure that the General Assembly can understand the breadth of the discussions that went into the Panel's work.

Some of these sections also include recommendations that the General Assembly should consider in conjunction with the recommendations above.

Training and Outreach

The Panel recognizes the need for more training in the area of racial biases, racial equity, cultural sensitivity and understanding how these matters impact discretionary decision-making and entrench white supremacy in the criminal and juvenile justice systems. We recognize that this training is currently in place in some areas of the criminal and juvenile justice systems. This training exists for law enforcement, judges, prosecutors, and other actors in these systems, but we feel that it should be expanded. Training should also include members and staff of the Legislature, and citizens who might be exposed to law enforcement or the criminal justice system. This expansion of training has been described in other jurisdictions as a "Know Your Rights" campaign, and would include informing people of their right to an attorney, their right to remain silent, etc. Such an expansion could be partly based upon fora that would take place around the state.

Legislative Inclusion

The 2019 legislative session saw the introduction of a fair number of bills that were roughly concerned with the same issue with which the Panel is concerned – namely, the amelioration of the effects of white supremacy across the criminal and juvenile justice systems. Panel members expressed concern with the way in which these bills were formulated and shepherded through the legislative process. We are very aware of the old aphorism, much used in minority communities in such circumstances, that says "not about us, without us." The point of this saying concerns the ways in which legislation that affects minority communities is usually created – wrongly - without the input of these communities. Some members of the Panel were of the opinion that this process was once again in evidence during the 2019 session, and that one recommendation of the Panel would be to ask for the end of such an exclusionary process.

The Panel hopes that legislative proposals that can conceivably impact minority communities be vetted in a manner that includes these often-silent and/or ignored voices. This can be achieved by working with extant bodies that have connections to these communities, such as the Racial Equity Advisory Panel; the Executive Director of Racial Equity; and the Attorney General's Racial Disparities Panel itself. The Panel also suggests that the job description of the Executive Director of Racial Equity be expanded to include the tracking of legislation, the identification of impacted communities, and coordination with them to ensure that their voices are involved in the legislative process.

Pre-Trial Monitoring and Risk Assessment

The Panel also considered the statewide use of pretrial monitors as well as the possibility of validated risk assessments tools to provide evidence-based information for courts.

One member of the Panel spoke to the fact that while pre-trial services are available statewide, they are not uniformly implemented. The question of encouraging and achieving uniform use of pretrial monitors has been raised with the hope that the Legislature would turn some attention to this issue.

Further, while pretrial monitors utilize needs screening and assessments, risk assessments are not used. The legislature should investigate their use because such assessments could provide courts with a more objective and statistically anchored measure of an individual's risk to the community, thereby reducing the possibility for implicit biases to affect decision-making with respect to pretrial conditions of release. Risk assessments are imperfect, as the inputs to a risk assessment can reflect societal inequities, but a study has shown that despite this unfortunate reality using such assessments can lead to more fair outcomes.

Home Detention

Home Detention for individuals detained pretrial has the potential to help keep already tattered minority communities and families together; in this case, while the criminal process is underway. A Panel member has noted that “the Legislature has directed that home detention is only available when someone is being detained for lack of bail, i.e. not for individuals being held *without* bail.” We wonder whether the expansion of home detention could decrease the detainee population or whether it would represent an increase in more restrictive conditions of release. Again, this is a discussion that we have identified as being of great importance to the mandate of the Panel. It is one that we have begun, but one which needs to be continued on the legislative level.

Mental Health and Substance Use Disorders

The Panel believes in the expanded support of response teams that include experts in mental health and substance use disorders (licensed counselors or clinicians) who assist in responding to behavioral health situations, prevent excessive use of force, reduce the prevalence of mental health and substance use crises, and avoid unnecessary entry into the court system when the matter is better handled by alternative measures. Reducing court involvement can reduce the impact of racially disparate outcomes.

Staffing

One theme that can be seen in these paragraphs is a move towards a more individualized approach to cases, one that is more outcome-based and designed to address the specific needs of each person in the criminal justice system. Indeed, this is a theme that has national resonances as many individuals, policy-makers as well as regular citizens, recognize that historical initiatives,

such as mandated sentencing policies, have contributed enormously to the racial disparities manifested in the criminal justice system. The Panel feels that this individualized approach to criminal justice requires a reduction in current caseload pressures.

Impact upon People of Color

A broadly-shared idea among many of the Panel members was a concern with ensuring that policies being adopted in the State do not have a disproportionate impact upon People of Color. One Panel member pointed to the fact that often laws seem to be neutral on their face, but have a disproportionate impact upon minority communities when applied – the infamous “three strikes” laws would be an egregious example of this. Thus, the Panel is concerned with conceiving of strategies to track and document the racial impacts of policies being made in the State. One recent bill – H. 381, an act relating to racial impact statements – is perhaps a step in this direction, although there is a pervasive sense among Panel members that the creation of such legislation should involve the input of communities of color, and that of bodies such as the Attorney General’s Panel itself.

Discretion

Discretion is a cornerstone of the criminal justice system. It is not necessary to speak of its known benefits, but, in light of racial disparity in the application of the law, it is necessary to speak of the many ways in which implicit bias can make its unacknowledged way into decisions made by prosecutors, law enforcement officers, and judges. It was felt by several members of the Panel that a system of oversight, of checks and balances, does not presently exist for the aforementioned officials, and that that lack of oversight contributes to the persistence of a problem for citizens who belong to communities of color. The Panel recognizes that many of its recommendations are already aimed at this issue, and that it remains a huge area for discussion. The Panel notes that creating a solution for the issue of judicial discretion and embedded implicit bias is something that cannot easily be done during one, two-hour long meeting per month.

Non-consensus Reports

Certain ideas were discussed by the panel and supported by some members, but not all panel members could support them due to legal and practical concerns. Nevertheless, in the interest of a full airing of our discussions, the Panel felt that it was fair to include some of these ideas with the acknowledgement that they do not have the support of the Panel as a whole.

- Establish a separate and independent judicial program that permits the criminal or family courts to divert eligible cases out of the court system pre-conviction. ODG, AGO, judiciary supports; SAS disagrees.
- Clarify that when considering the totality of the circumstances in assessing the lawfulness of a search and seizure, racial bias may be a relevant factor in this analysis, consistent with federal and state law. *See, Zullo v. State*, 2019 VT 1, ¶ 84. ODG supports; SAS, AGO, judiciary disagree.
- Expand the list of offenses that qualify for Diversion. All alleged offenders, regardless of criminal history, are presently eligible for Diversion under the

Tamarack Program, unless an individual is accused of a listed felony (this list is found at: 13 V.S.A. § 5301). Common Justice, an alternative-to-incarceration and victim service program in New York City at www.commonjustice.org.

- Establish community-level boards made up of local law enforcement, DCF, the State's Attorney's Office, and public defenders, as well as community members, to review and respond to racial justice issues.

Conclusion

What is important about defining white supremacy and its effects is that such work gives us a basic understanding of the conditions in which we live and how those conditions impact our communities. In order to do something about white supremacy we must name it. We must understand that here in Vermont and around the country we all live in a society that upholds white supremacy. It is essential to remind ourselves that this work is not only about individuals, but is rather about structures and systems. The ways in which we navigate these systems may be different for each of us depending upon who we are and what benefits we receive or do not receive from these systems. It is important to recognize that we are trying to create a culture shift. We are trying to bring awareness, practice and action to the political table. We do not need to find a single definition of white supremacy for us all to agree upon. This is not the final answer to the problem. What is essential is to use that definition to give us the tools and skills that we need to begin the culture shift that is necessary for the change that we want to see.

According to various authorities in the state it has been over two decades since complete systems change has been a focus. This means ~~is~~ that we have changed surface level policies, (e.g. instituted biannual trainings), but we haven't looked at the Root of the problem and decided what is truly needed to make these initiatives successful. Though these surface efforts have improved some of the situation of People of Color in Vermont, these efforts still remain mostly on the surface. This report is about digging deep. It is about going to the roots of the problem and creating the essential systemic change that is needed to dismantle a system that is hurting us all.

During this process of systemic change we acknowledge that there will be stages of understanding and stages of learning through which all will pass, and we hope that the Legislature is up for the task. There is nothing comfortable about this work. We know that this will not be easy. We ask that when considering this document that you familiarize yourself with the characteristics of white supremacy. We ask that you note how the characteristics of white supremacy manifest in you yourself, and within the laws, policies and systems that you are trying to create. We ask that you work to undo and dismantle the characteristics of supremacist thinking in your world so that we may begin to undo the harm.

For more information on how to dismantle the racial structures that poison our society we offer the following resource:

<http://www.dismantlingracism.org/racism-defined.html>