

To: Task Force on Constitutional Rights and Remedies

From: Karen Sheley, General Counsel for ICJIA

Date: 12/8/2021

Re: Proposed structure for votes on recommendations

***I. Recommendations on statutory changes to address qualified immunity***

**Recommendation 1:** Make no changes to Illinois law that would impact the qualified immunity defense.

Call for a motion: To adopt Recommendation 1 and append the following supportive documents to the report:

- Letter from Joel A. D’Alba dated November 22, 2021.
- Memorandum from Tamara L. Cummings dated November 24, 2021.
- Letter from Jim Kaitschuk dated November 23, 2021.
- Memorandum from Chris Conrad dated October 19, 2021 (revised version).
- Letter from Representative Ugaste dated October 19, 2021.

**Recommendation 2:** The creation of a state law cause of action for violation of constitutional rights, with no qualified immunity, but with both indemnification of officials and respondeat superior for their employers (whether state or municipal), and with available attorneys’ fees.

Call for a motion: To adopt Recommendation 2 and append the following supportive documents to the report:

- Memorandum from Professor Carolyn Shapiro dated November 29, 2021.

**Recommendation 3:** The General Assembly pass H.B. 1727, the Bad Apples in Law Enforcement Accountability Act (“Bad Apples Act”).

HB 1727 creates a cause of action for individuals who have had their rights under the Illinois Constitution violated by police, and precludes reliance on qualified and other blanket immunities as a defense in such actions. The bill authorizes courts to sanction those who bring frivolous claims, and also allows courts to award attorney’s fees and costs to the defendant if the lawsuit and claim turned out to be frivolous. Lastly, to encourage transparency, the bill contains a provision that would require police departments to disclose information about settlements or judgments under the law.

Call for a motion: To adopt Recommendation 3 and append the following supportive documents to the report:

- Memorandum from Professor Craig Futterman dated November 27, 2021.
- Memorandum from Peter Hanna dated November 29, 2021.

- Memorandum from Professor Craig Futterman, Vatsala Kumar and Katherine Koza dated October 27, 2021.

**Recommendation 4:** The creation of a state law cause of action for violation of constitutional rights by police, precluding reliance on qualified immunity or blanket statutory protection for police, and allowing recovery of damages suffered as a result of the constitutional violation.

Call for a motion: To adopt Recommendation 4 and append the following supportive documents to the report:

- Memorandum from Peter Hanna dated November 29, 2021.
- Memorandum from Professor Craig Futterman dated November 27, 2021.
- Memorandum from Professor Craig Futterman, Vatsala Kumar and Katherine Koza dated October 27, 2021.

**Recommendation 5:** Adoption of a state law cause of action as in Recommendation 4, but where the cause of action can be brought against all government employees, and with both indemnification of officials and respondeat superior for their employers (whether state or municipal), and with available attorneys' fees.

Call for a motion: To adopt Recommendation 5 and append the following supportive documents to the report:

- Memorandum from Peter Hanna dated November 29, 2021.
- Memorandum from Professor Craig Futterman dated November 27, 2021.
- Memorandum from Professor Craig Futterman, Vatsala Kumar and Katherine Koza dated October 27, 2021.

**Recommendation 6:** Any cause of action created to enforce the Illinois constitution should include a provision allowing for punitive damages against individual officers.

Call for a motion: To adopt Recommendation 6 and append the following supportive documents to the report:

- Memorandum from Peter Hanna dated November 29, 2021.
- Memorandum from Professor Craig Futterman dated November 27, 2021.
- Memorandum from Professor Craig Futterman, Vatsala Kumar and Katherine Koza dated October 27, 2021.

**Recommendation 7:** Any cause of action created to enforce the Illinois constitution should apply to all government officials, not just law enforcement.

NOTE: If #5 passes, this is duplicative.

Call for a motion: To adopt Recommendation 7 and append the following supportive documents to the report:

- Memorandum from Professor Carolyn Shapiro dated November 29, 2021.
- Memorandum from Professor Craig Futterman dated November 27, 2021.
- Memorandum from Professor Craig Futterman, Vatsala Kumar and Katherine Koza dated October 27, 2021.
- Memorandum from Chris Conrad dated October 19, 2021 (revised version).

**II. *Recommendations that cases be brought in alternate forums***

**Recommendation 8:** If the Task Force determines a mechanism is immediately required to permit individuals to seek remedies for alleged constitutional violations, then consideration should be given to existing Illinois statutes, agencies and commissions. The Illinois Human Rights Act currently secures and guarantees certain rights under sections of the Illinois Constitution of 1970. 775 ILCS 5/1-102(F) By expanding the Illinois Human Rights Act’s authority over additional Sections and Articles of the Illinois Constitution, both administrative and civil remedies could be made available to individuals alleging harm.

The Illinois Department of Human Rights (IDHR) and Illinois Human Rights Commission’s (IHRC) current roles could be adopted to investigate and adjudicate alleged violations. For example, the IHRC’s existing authority for limited civil penalties could be applied to additional violations by government entities. 775 ILCS 5/8-109.1 Also, the Illinois Human Rights Act currently contemplates circuit court actions under certain circumstances for alleged violations. Most importantly, the Act also provides safeguards for both individuals and government entities. 775 ILCS 5/10-102

Call for a motion: To adopt Recommendation 8 and append the following supportive document to the report:

- Recommendations from Matt Davis, Illinois State Police.

**Recommendation 9:** Set up a special court to hear these specific cases in which a person was denied a remedy because of a federal court determination that Qualified Immunity could be invoked similar to a Worker’s Comp process; an alternative for qualified immunity could also exist in the Court of Claims.

Call for a motion: To adopt Recommendation 9 and append the following supportive document to the report:

- Memorandum from Chris Conrad dated October 19, 2021 (revised version).

**\*\*\*\*\*Recommendation 10 is conditional on Recommendation 9 passing. Only call this recommendation for a vote if Recommendation 9 passes.\*\*\*\*\***

**Recommendation 10:** Set parameters for entry into this special process. For instance, to understand the scope of what the court would be dealing with, limit it to claims that have been barred due to Qualified Immunity in federal court. Also, consider limiting this option to excessive use of force cases, to make it clear that this is not

available to anyone who has a complaint against law enforcement and other government actors no longer protected by qualified immunity.

Call for a motion: To adopt Recommendation 10 and append the following supportive document to the report:

- Memorandum from Chris Conrad dated October 19, 2021 (revised version).

**III. Additional recommendations if the Task Force recommends changes to Qualified Immunity**

**\*\*\*\*\*Recommendations 11-15 will only be called for a vote if the Task Force recommends changes to qualified immunity because they were proposed in the alternative.**

**Recommendation 11:** Encourage Congress to consider codifying in federal law some of the reasonable applications of qualified immunity by the U.S. Supreme Court, first in *Saucier v. Katz*, 533 U.S. 194 (2001). Maintain in law a way to hold police agencies accountable without making an officer liable for committing an act that he/she did not know was wrong or unconstitutional.

Call for a motion: To adopt Recommendation 11 and append the following supportive document to the report:

- Memorandum from Chris Conrad dated October 19, 2021 (revised version).

**Recommendation 12:** Obtain the data on the actual number of Section 1983 cases in Illinois that are disposed of because of Qualified Immunity. We cannot formulate a remedy without knowing the actual problem. At this point we appear to have a solution in search of a problem.

Call for a motion: To adopt Recommendation 12 and append the following supportive document to the report:

- Memorandum from Chris Conrad dated October 19, 2021 (revised version).

**Recommendation 13:** Understand that removing indemnity serves only to punish individual government actors and does not actually make victims whole. Removing indemnity would exacerbate the current problems with recruitment and retention. To be consistent with the concept of procedural justice advanced by Professor Smith, just as it is unfair to have someone subjected to a civil rights violation go without a remedy, it is also unfair to impose an individual financial liability on a government actor who did not know his or her actions were improper.

Call for a motion: To adopt Recommendation 13 and append the following supportive document to the report:

- Memorandum from Chris Conrad dated October 19, 2021 (revised version).

**Recommendation 14:** Set reasonable limits on recovery. This will require plaintiffs' attorneys to do a cost-benefit analysis before starting litigation and would be necessary to prevent unscrupulous lawyers from filing frivolous claims, thus driving up costs for municipalities or the state.

*Proposed alternative: Any cause of action created to enforce the Illinois constitution should include limitations on recovery, including a disincentive for frivolous claims.*

Call for a motion: To adopt Recommendation 14 and append the following supportive document to the report:

- Memorandum from Chris Conrad dated October 19, 2021 (revised version).

**Recommendation 15:** To prevent crippling increases in liability on municipalities, make this a state program with state funding. This would help preserve public funds/resources for the greater public good rather than to benefit the few.

*Proposed alternative: If a cause of action is created to enforce the Illinois constitution, the cause of action should also designate state funding.*

Call for a motion: To adopt Recommendation 15 and append the following supportive document to the report:

- Memorandum from Chris Conrad dated October 19, 2021 (revised version).

#### **IV. Stand-Alone Recommendations**

**Recommendation 16:** A mandatory reporting database for all settlement agreements and civil litigation involving law enforcement officers and agencies should be statutorily created. Under this proposed statute, all settlement agreements entered into by law enforcement agencies, on the behalf of their officers, or by individual officers shall annually be reported to the Illinois Law Enforcement Training and Standards Board (ILETSB). The details of settlement would minimally include a description of the alleged law enforcement conduct, the alleged harm, any remedial actions taken by the agency, and the value of any payments made by parties.

In addition to settlement agreements, law enforcement agencies would be required to report the disposition of any civil litigation decided during each calendar year. The details of litigation would minimally include whether a claim of qualified immunity was raised, granted, or denied during the litigation. Failure to submit an annual report would result in fines or other administrative actions taken against law enforcement agencies and/or officers. The ILETSB would be required to promulgate administrative rules to govern the reporting databases as well as fines or actions taken to address noncompliance.

Call for a motion: To adopt Recommendation 16 and append the following supportive document to the report:

- Recommendations from Matt Davis, Illinois State Police.

**Recommendation 17:** Adopt a resolution commending police officers as “first protectors of civil rights in Illinois.”

Call for a motion: To adopt the resolution drafted by the Illinois Association of Chiefs of Police and append it to the report:

- Resolution drafted by the Illinois Association of Chiefs of Police.