



## The Pennsylvania Interbranch Commission for Gender, Racial and Ethnic Fairness

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# Pennsylvania State Report: 2021 Annual Conference of the National Consortium for Racial and Ethnic Fairness in the Justice System

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## Criminal Justice Initiatives

**Background:** The focus of the Commission’s criminal justice initiatives is on reforming Pennsylvania’s indigent defense system and eliminating racial, ethnic, and socio-economic disparities at all stages of its criminal justice system.

**Indigent Defense:** At the request of legislative leaders last year, the Commission drafted and submitted a set of proposed reforms of Pennsylvania’s chronically underfunded, county-based public defender system. The resulting report, *Memorandum in Support of Reform of the Provision of Criminal Indigent Defense Services in Pennsylvania*, also contains an analysis of the costs and benefits of the proposed statewide and state-funded reforms. It is intended to serve as the basis for bipartisan legislation that will overhaul the Commonwealth’s broken system and deliver on its constitutional obligation to provide effective assistance of counsel to indigent defendants. Although the COVID-19 pandemic has temporarily slowed legislative progress on this initiative, the Commission remains optimistic that legislation will soon be introduced, beginning with the provision of state-funded legal support services for Pennsylvania juvenile defense lawyers.

**Bail and Legal Financial Obligation (“LFO”) Reform:** As part of its effort to reduce the pre-trial detention of indigent defendants charged with low-level, non-violent crimes, the Commission distributed to its county-based President Judges a set of proposed rules designed to decrease the use of cash bail in their judicial districts. The Commission has also been working to address a related issue - the jailing of indigent individuals for failure to pay court fines and costs. In addition to producing a guide for the courts on this subject, the Commission worked with Pennsylvania ACLU on drafting and submitting proposed court rules to strengthen the judicial requirement of conducting a detailed hearing on a defendant’s ability to pay such expenses. Additionally, the Commission collaborated with the ACLU on an *amicus* brief to the Pennsylvania Supreme Court, challenging a lower court’s holding that an existing rule of criminal procedure does not *require* a court to consider the financial resources of the defendant when imposing court costs. Most recently, the Commission has begun working with the Philadelphia Lawyers for Social Equity (“PLSE”) to rescind a new policy enacted by the Pennsylvania

Board of Pardons that requires payment of outstanding court costs as a precondition for a clemency hearing. See below for more detail.

**Pardons Project:** The Commission was recently approached by PLSE regarding its efforts to reverse the Pennsylvania Board of Pardons' new policy prohibiting hearings on an individual's clemency application when that individual owes outstanding fines, fees, or costs. In partnership with the Juvenile Court Judges' Commission ("JCJC"), the Commission has drafted a letter to the Board requesting a meeting to discuss rescission of the policy on the basis that the action taken by the Board exceeds its authority under the Pennsylvania Constitution.

**Capital Punishment:** Although Governor Wolf's 2015 decision to implement a moratorium on executions remains active, Pennsylvania's death penalty statute remains in force. Accordingly, during its last meeting with the Governor, Commission members reviewed with him the findings of two critical studies conducted over the past three years that found significant problems with the administration of the death penalty in Pennsylvania. They also informed him of the preliminary findings of a yet-to-be completed third study on the death penalty being conducted by the Penn State Criminal Justice Research Institute. The study's preliminary findings to date indisputably reveal serious constitutional deficiencies in the system and disparities in outcomes based on race. The Governor will consider the findings and recommendations of all three studies before making further decisions regarding the continued viability of the death penalty statute. Executive Director McCormick has recently held a virtual meeting with a state representative who intends to sponsor a bill this legislative session that would permanently repeal capital punishment in the Commonwealth.

**Racial Disparities in Life-without-Parole Sentences for Second-Degree Murder:** A recent study has found that almost 70% of people incarcerated for life without parole on second-degree murder convictions in Pennsylvania are Black. The study also determined that the vast majority of defendants were 25 or younger at the time of the crime, with 34% being between the ages of 18 and 20; Black youths comprise 75% of those 18-20 year olds. Finally, 81% of people prosecuted in a group in which two or more people were convicted of second-degree murder are Black, suggesting that the statute's equal application to principals and accomplices disproportionately affects Black people. On the basis of this study, the Commission is working with the Lieutenant Governor and other stakeholders on drafting legislation to amend the statute in several ways, including eliminating life-without-parole sentences for accomplices.

**Legislative Initiatives:** The Commission has advised the Pennsylvania Legislature of its concerns with the ineffectiveness of several pending police misconduct bills. To strengthen future reform initiatives, the Commission is now coordinating with a state senator on various pieces of related legislation, including one that would comprehensively and effectively ban the use of officer-induced chokeholds. The Commission is also working on a bill that would require police departments in the Commonwealth to establish in-house, or contract with, a specially trained mental health unit that would accompany officers responding to reports of potentially dangerous situations involving individuals suffering from mental health crises. The bill would also establish a grant program to support the implementation of these procedures. The Commission has also sent numerous letters to legislators expressing support for legislation providing for criminal record expungement and probation and parole modifications, while opposing legislation related to mandatory minimum sentencing.

## Interpreter Services Initiatives

**Background:** The focus of the Commission’s interpreter services initiatives is on improving access for litigants with Limited English Proficiency (“LEP”) to interpreter and translation services in the Commonwealth’s courts and administrative agencies.

**Jury Service Pamphlet:** To increase juror diversity throughout the Commonwealth, the Commission worked with the U.S. District Court for the Western District of Pennsylvania to produce a pamphlet that educates LEP individuals about jury service and on the level of English language proficiency needed to serve on a federal jury. As of this date, 2000 copies of this pamphlet have been distributed to the Western District courts for dissemination at naturalization ceremonies, and the Eastern and Middle Federal Districts are also expected to participate in this initiative. The Commission has also drafted a revised version of the federal juror pamphlet for use by each state judicial district for the benefit of LEP individuals throughout the Commonwealth.

**Immigration and State Courts:** Over the past two years, the Commission has received numerous reports of state court judges and personnel collaborating with Immigration and Customs Enforcement (“ICE”) agents to effectuate the detention or deportation of immigrant court users in and around the state courthouses. In response, the Commission has sent two letters to the Pennsylvania Supreme Court detailing these incidents and urging the Court to take action to address this unconstitutional interference in state court business. Among other actions, the Court asked the Administrative Office of the Pennsylvania Courts (“AOPC”) to issue a directive advising judicial officers that this conduct likely violates Title VI of the Civil Rights Act of 1964. The Commission has also requested that the Court adopt a statewide policy that would limit ICE’s presence in state courthouses and prohibit court personnel from working with ICE to detain undocumented individuals. Although the COVID-19 crisis has delayed a response from the Court, the Commission is hopeful that the Court will establish some version of these recommendations in the near future.

**AOPC Initiatives:** Acting on a grant from the State Justice Institute, the AOPC is working to translate landlord-tenant and other court forms into languages frequently spoken by court users. In addition, the AOPC’s Interpreter Certification Program has used a mix of virtual and CDC-compliant in-person events to host interpreter orientation workshops and testing. This past fall, the AOPC also conducted its 3<sup>rd</sup> annual Language Access Coordinator Summit via a series of virtual sessions, educating participants about remote interpreting platforms, court form translations, and language access to services beyond the courtroom.

## Jury Diversity Initiatives

**Background:** The focus of the Commission’s jury service initiatives is on increasing diversity and public participation on juries throughout the Commonwealth.

**Statewide Juror List:** In order to create a more diverse juror pool that reflects Pennsylvania’s demographics, the Commission worked with four state agencies to establish a Statewide Juror List. While the list reaches a much more racially and socioeconomically diverse group of citizens, the presence of a large number of duplicate names on the list has prevented most judicial districts from using it. Accordingly, the Commission has been working with these agencies and the AOPC to find

a unique identifier or other means of enabling state courts to use the list. As a result of these efforts, the AOPC distributed an updated juror list in October 2020, and approximately two-thirds of judicial districts now rely on it for summoning jurors. The Commission has also begun discussions with the federal courts about the possibility of establishing a similar list, particularly in light of statutory provisions that permit federal courts to obtain state court records.

**Legislative and Other Initiatives:** During the 2021-2022 legislative session, the Commission will work with key legislators to re-introduce its proposed modifications to Pennsylvania’s juror exemptions and excusals statute - a statute that currently contributes to the lack of diversity on state court juries. In addition, the Commission has been collaborating with the Governor’s office and legislators on re-introducing a bill that would reduce the range of criminal offenses that currently disqualify former offenders from jury service for life.

## **Equal Opportunity and Diversity Initiatives**

**Background:** The primary focus of the Commission’s equal opportunity and diversity initiatives is on promoting diversity and eliminating bias within the legal profession and court system.

**Ethical Code Amendment Prohibiting Discrimination:** After years of hard work by the Commission in drafting various versions of it and advocating for its passage, the Pennsylvania Supreme Court adopted Rule 8.4(g) in June 2020, thus officially prohibiting attorneys from engaging in sexual harassment or discriminatory conduct in the practice of law. Shortly thereafter, the Hamilton Lincoln Law Institute filed a lawsuit against the Pennsylvania Supreme Court’s Disciplinary Board in the U.S. District Court for the Eastern District of Pennsylvania, requesting, on free speech grounds, that the Court grant an injunction barring enforcement of the Rule. The District Court subsequently granted that motion, staying enforcement of the Rule as proposed. The Commission collaborated with the Pennsylvania Bar Association (“PBA”) and other stakeholders on drafting an amicus brief in support of an appeal, but the appeal was withdrawn before submission, and the Disciplinary Board is now charged with making modifications to the original version of the Rule. When it is completed, the Commission plans to comment on the revised Rule to ensure that it accomplishes the purpose for which it was originally drafted.

**Implicit Bias Training:** In tandem with the PBA, the Commission has devoted many hours to advocating for the Pennsylvania Supreme Court to require lawyers to take an annual CLE course on diversity, inclusion, and anti-bias training. The Court responded by asking the Pennsylvania CLE Board for a recommendation on the request. The CLE Board ultimately recommended that the Court require this training, which is currently under consideration by the Court. In the meantime, Commission members and Executive Director McCormick have presented numerous CLEs on implicit bias over the past couple of years, including a new program, entitled “Objection: An Interactive Educational Experience on Diversity and Bias Issues in the Legal Profession,” that was presented to the PBA’s Labor and Employment Law Section in March 2021. The Commission also continues to convene meetings of its Implicit Bias in Legal Education Work Group, comprised of deans and administrators from each of Pennsylvania’s law schools with whom the Commission is collaborating on drafting a multi-faceted implicit bias training program that the law schools will integrate into their curricula.

**Mandatory Anti-Discrimination Training:** After learning of numerous occurrences of discriminatory judicial misconduct, the Commission sent a letter to then-Chief Justice Thomas Saylor in September 2020, advising him of these incidents and urging the Court to require all state jurists and judicial employees to undergo annual, mandatory anti-discrimination training. At the request of then-Chief Justice Saylor, the AOPC and CJE Board of Judges are in the process of issuing a recommendation to the Court on whether such training is needed and whether it should be mandatory. The Commission is awaiting a decision on the recommendation from the Board and the AOPC.

**Legislative Policy on Workplace Discrimination & Harassment:** In response to the pervasive acts of sexual harassment that have permeated Pennsylvania's legislative branch for years, the Commission actively supported bills during the last legislative session that would have created uniform, internal procedures for filing, investigating, and adjudicating sexual harassment complaints within the state legislature. Because these bills did not become law, the Commission is re-thinking its strategy regarding the most effective way to produce a policy for harassment in the state legislature.

**Comments on Proposed Rules:** In October 2020, the Commission submitted formal comments to two PA Supreme Court Rules Committees regarding the following issues: 1) opposing proposed changes to *In Forma Pauperis* procedures that would make it more difficult for indigent court users to secure that status, and (2) supporting a new evidentiary rule recommended by the Commission that would restrict the admissibility of immigration status into evidence during litigation. Both proposals are currently under Court consideration.

**Retrospective Study and Review of Racial, Ethnic and Gender Bias in the Pennsylvania Justice System:** Executive Director McCormick and two Pennsylvania judges representing the National Bar Association Judicial Council have submitted a proposal to the PA Supreme Court to conduct a review of the Commission's implementation of the recommendations from the 2003 report by the Supreme Court Committee on Racial and Gender Bias in the Justice System. The proposal details the retrospective review's goals and funding requests. While many of the original report's recommendations have been implemented, the review will address unfulfilled goals, such as indigent defense reform, and addressing newer priorities, such as structural racism and police misconduct.

## **Anti-Domestic Violence and Sexual Assault Initiatives**

**Background:** The focus of the Commission's anti-domestic violence and sexual assault initiatives is to improve the legal response to the unique needs of domestic violence and sexual assault victims.

**Collaborations with then-Secretary of Health Dr. Rachel Levine:** Shortly after Pennsylvania implemented its COVID-19 stay-at-home order, several victims' advocacy organizations requested the Commission's help with addressing a marked increase in the incidence of domestic violence and child abuse, and a corresponding decline in the number of calls by victims and witnesses to helplines. In response, the Commission successfully arranged for then-PA Secretary of Health Dr. Rachel Levine to devote a portion of her daily COVID-19 press briefing to informing the public about the continued availability of access to the courts and to domestic violence and child abuse victims' services during the course of the pandemic. The Commission continues to monitor both issues.

**Human Trafficking:** This past year, the Commission’s guide entitled *Guiding Principles to Address the Needs of Victims of Human Trafficking in Pennsylvania* was published on the PA Office of Victims Services’ website. In addition, the Commission sought and obtained from the Interstate Commission for Juveniles (“ICJ”) an important clarification concerning the applicability of ICJ rules to juvenile human trafficking victims. As clarified, the rule will permit juvenile human trafficking victims who are not under court supervision in their home states to remain in the state in which they were found, thereby enabling them to obtain support in their new location away from traffickers. Because the ICJ’s rule clarification explicitly prevents the involuntary return of victims to their home states, the Commission is actively involved in educating public agencies and the courts about this update. The Commission is also collaborating with K&L Gates law firm to promote its Anti-Human Trafficking Initiative which provides pro bono, civil court representation to victims of human trafficking, particularly but not exclusively in the LGBTQ community.

## **LGBTQ Rights Initiatives**

**Background:** The primary focus of the Commission’s LGBTQ rights initiatives is to end discrimination against LGBTQ Pennsylvanians in our courts and throughout the Commonwealth.

**Work Group on Out-of-Home Placement for LGBTQ Youth:** The Commission is collaborating with Lambda Legal and other relevant stakeholders to update the PA Department of Human Services’ regulations to include non-discrimination protections for LGBTQ foster youth in out-of-home placements.

**Assessing the Impact of COVID-19 on the LGBTQ Community:** In order to obtain a better understanding of how the COVID-19 pandemic has uniquely affected the LGBTQ community, the Commission is working with the PA Department of Health to obtain any data it has collected on the impact of COVID-19 on the LGBTQ community. The Commission is also working with several LGBTQ-focused organizations in Pennsylvania to obtain similar information which could be used to inform Health Departments throughout the state of any special needs of the LGBTQ community related to COVID-19.

**Comments on Proposed Federal Rules Impacting the LGBTQ Community:** The Commission reviewed and submitted official comments on two rule changes proposed by HHS and HUD during the final days of the Trump administration. If implemented, these rules would have removed existing non-discrimination protections in general and harmed transgender individuals in particular. Fortunately, the HUD-based rule was not finalized by the end of the Trump administration’s term, and the Commission is now working to confirm that the Biden administration will permanently prevent the HHS rule from taking effect.

**Legislative Initiatives:** Working with a broad coalition of supporters, the Commission continues to advocate for passage of legislation that will amend the Pennsylvania Human Relations Act (“PHRA”) to include sexual orientation and gender identity within its protected classes, specifically in the contexts of employment, housing, and public accommodation.