

VLCT PACIF's Evaluation of Elimination of Qualified Immunity on Policing

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Presently proposed in the Vermont Legislature are bills that propose Vermont create a new and expansive private cause of action for monetary damages against Vermont law enforcement personnel and, additionally, remove immunities as a defense.¹ Review of Vermont's municipal experience with qualified immunity demonstrates that the changes are not necessary, may adversely impact availability of necessary municipal police services, and reallocate scarce resources away from other police reform efforts.

Vermont Qualified Immunity Law. Broadly speaking,² sovereign immunity protects the State; municipal immunity protects our towns and cities; official immunity protects “judges, legislators and the state's highest executive officers in cases where the acts complained of were performed within their respective authorities;”³ and qualified immunity protects “lower-level officers, employees, and agents.”⁴ The Vermont Supreme Court has explained that the purpose of qualified immunity is “to protect officials from exposure to personal tort liability that could (1) hamper their ability to effectively discharge their duties and (2) subject their discretionary determinations to review by a judicial system ill-suited to assess the full scope of factors involved in such

¹ Under the proposed legislation, monetary damages can be sought by an “individual injured or damaged by the commission or omission of any act of a law enforcement officer acting under authority of the State, or within the scope of authority of a law enforcement agency, that violates the individual’s rights guaranteed under a provision of the Constitution of the State of Vermont that provides a private right of action, prescribed by Vermont statute, or created by Vermont common law, may bring an action for damages or equitable relief against the law enforcement officer.” Further, “an action brought pursuant to this section is not subject to . . . common law doctrines of immunity as a defense to liability.”

² See generally *Levinsky v. Diamond*, 151 Vt. 178, 183 (1989); *Libercent v. Aldrich*, 149 Vt. 76 (1987); see also *Hillerby v. Town of Colchester*, 167 Vt. 270 (1997).

³ *Levinsky v Diamond*, 151 Vt. at 185.

⁴ *Id.*

determinations.”⁵ Qualified immunity extends to individuals (1) acting during their employment and acting, or reasonably believing they are acting, within the scope of their authority; (2) acting in good faith; and (3) performing discretionary, as opposed to ministerial acts.”⁶

An important nuance decided in *Levinsky* is that the test for whether the employee is acting in good faith should be an “objective” one. Rather than assessing subjective motives in order to determine whether the employee acted in good faith, the *Levinsky* court concluded that “[r]eliance on the objective reasonableness of an official’s conduct . . . [should] permit the resolution of many insubstantial claims on summary judgment.”⁷ Then, in *Murray v White*, 155 Vt. 621 (1991), the Vermont Supreme Court reiterated that “the good faith inquiry . . . does not ask whether plaintiff’s rights have been violated, but rather whether clearly established law exists, and only then whether defendant’s conduct transgressed such law.”⁸

Potential Negative Impact on Availability of Necessary Police Services. The greatest concern with the proposal to eliminate qualified immunity is the potentially devastating impact it might have on the availability of necessary police services for our municipalities. As noted above, one purpose of qualified immunity is to allow some lawsuits to go forward but not inhibit officers from performing their duties. An additional concern is that litigation will discourage people from seeking or continuing employment.

VLCT’s Law Enforcement Consultant is already hearing that departments are short staffed and unable to recruit enough qualified people to replace the ones that are leaving. Additionally, several smaller communities have reported that they have tried to obtain police services from the State or local sheriff and been told that adequate staffing does not exist.

Eliminating qualified immunity will compound the problem. A recent survey of approximately 1,000 Vermont municipal police officers – 330 of whom responded – by the Vermont Association of Chiefs of Police (VACOP) is illustrative. Responding to the question, “Would the loss of qualified immunity bring you reluctance in the performance of your duties?”, 85.76% said yes, 3.64% said no, and 10.61% said not sure. Responding to the question, “If you were no longer afforded qualified immunity, would you still plan to stay in law enforcement?”, 12.12% said they would not leave law enforcement, 36.97% said they were stuck and would have to stick it out, and 47.27% said they would leave either immediately, within a year, or as soon as they found another job.

⁵ *Baptie v. Bruno*, 2013 VT 117, ¶ 12.

⁶ *Baptie v. Bruno*, 2013 VT 117, ¶ 11; *Levinsky v. Diamond*, 151 Vt. at 185.

⁷ *Levinsky v. Diamond*, 151 Vt. at 190 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 817-18 (1982)).

⁸ *Murray v. White*, 155 Vt. at 627.

The survey data is consistent with what VLCT PACIF is hearing from its members. The proposed legislation appears likely to significantly exacerbate the existing serious morale and staffing problem, thereby reducing the ability of municipal police departments to provide services, and "inhibiting" those officers who remain from performing law enforcement efforts.

Making it Easier to Sue Law Enforcement Will Not Increase Accountability. Eliminating immunity for law enforcement will not materially improve police discipline and accountability. A lawsuit takes years to reach a resolution. Officer discipline, however, should be addressed in terms of weeks and months, and will be decided long before the lawsuit is resolved. Officer discipline is, and should remain, primarily the responsibility of the Police Chief, who reports to citizens such as the Town or City Manager, Select Board, or City Council. Additionally, Act 56 is a far superior pathway to professional regulation and offers a parallel path of officer accountability. As discussed below, if the goal is law enforcement accountability, fully implementing, funding, and staffing the Act 56 process is a far better option.

Municipal Claims Experience with Qualified Immunity. Proponents of eliminating immunity defenses for law enforcement personnel contend that qualified immunity precludes litigation and monetary compensation. However, qualified immunity has not prevented lawsuits seeking monetary compensation against Vermont municipalities and their police officers. In the past six years (2016-2021, inclusive), VLCT PACIF has paid out \$1,744,801.46 for damages or settlements on law enforcement claims. (These payments are for the covered municipalities, not for all sworn law enforcement.) In short, qualified immunity in its present form is not a blanket protection precluding all lawsuits or compensation.

Monetary Damages Claims Can Already Be Made Under Vermont's Constitution. An additional argument made by proponents of eliminating immunity defenses for law enforcement personnel is increasing the scope of potential lawsuits. However, the Vermont Supreme Court has already recognized private causes of action under the Vermont Constitution. In *Zullo v State*, 2019 Vt 1, the Vermont Supreme Court recognized a direct cause of action for monetary damages under Article 11 of the Vermont Constitution. That case involved a traffic stop which plaintiff argued violated his search and seizure rights. The Court concluded that "a private right of action seeking monetary damages for violations of Article 11 is available directly under that constitutional provision absent any adequate alternative legislatively enacted remedy."⁹

However, the proposed legislation seeks to undo the "limiting principle" the Vermont Supreme Court adopted in *Zullo*. This limiting principle, akin to qualified immunity, requires the plaintiff to

⁹ *Zullo v. State*, 2019 VT 1, ¶ 47.

establish "the officer either knew or should have known that the officer was violating clearly established law or the officer acted in bad faith."¹⁰ The Court reasoned that:

On a daily basis, law enforcement officers must make numerous decisions on how to handle interactions with citizens, particularly motorists. Even with liability falling on the State rather than the individual officer, a rule that exposes the State to a potential civil damages suit following every roadside stop, or whenever a motion to suppress is granted, could inhibit law enforcement officers from taking some effective and constitutionally permissible actions in pursuit of public safety. This would not be an appropriate result.¹¹

The same reasoning applies to municipalities and police officers. As discussed above, removing qualified immunity is likely to make many of our law enforcement officers either leave the job or become more reluctant to perform their duties.

Potentially Unmeetable Financial Exposure. VLCT PACIF's opposition to this legislation is not based on the financial impact to VLCT PACIF, but rather because of the impact it will have on our members. VLCT PACIF is an Intermunicipal Insurance Agreement (risk pool) regulated under the Department of Financial Regulation. The program was established by VLCT members in 1986 and is 100% member owned and funded.¹² VLCT PACIF is a non-profit and returns excess funds to members that are not needed for responsible operation of the program. In short, taxpayer dollars fund VLCT PACIF and are ultimately what will be at risk.

We expect this legislation will have a negative impact on VLCT PACIF's rates and ability to secure reinsurance. The severity of such an impact is presently unknown due to lack of data available to analyze. VLCT PACIF is not aware of another jurisdiction with similar legislation and sufficient history to analyze and make predictions. That said, PACIF's expectation is that the proposed legislation will succeed in generating more lawsuits, will succeed in generating more settlements and damages awards, and will succeed in increasing legal fees and costs. This additional expense will, in turn, be passed onto the taxpayers through additional contributions (premiums).

Of even greater concern is the fear that the legislation achieves its purpose so well that our municipal law enforcement officers and departments become uninsurable. PACIF purchases reinsurance to allow it to provide higher limits in a financially sound manner. If reinsurance becomes unaffordable or unavailable, there may be no choice but to lower limits or cease offering law enforcement liability coverage. This means municipalities would be financially responsible once

¹⁰ *Id.*, at ¶ 55.

¹¹ *Id.*, at ¶ 53.

¹² Membership is limited to Vermont municipalities. VLCT PACIF provides coverage for every municipal law enforcement agency and officer in the State except for the City of Burlington and the City of South Burlington, which currently do not participate in the program.

insurance is exhausted. Given the lack of damage-award caps in the proposed legislation, a single lawsuit could potentially bankrupt a Vermont municipality.

Lost Alternate Opportunities. Municipal resources are scarce and funded largely by property taxes. Insofar as there are additional available resources, VLCT PACIF staff believe those monies can be better spent on efforts to improve services rather than paying for protracted and expensive litigation. Two examples come to mind.

Law enforcement professional regulation through the Act 56 process holds officers directly accountable for their actions. An officer could see their certification suspended or revoked and could be prohibited from working in the profession in Vermont. The litigation process can, at most, result in a financial award that has no direct bearing on the officer's ability to continue in the profession.

While it has taken time to ramp up, the Act 56 process is at the cusp of full functionality. The Act 56 process is overseen by the Vermont Criminal Justice Council, a blend of law enforcement, civilian personnel, and people with lived experience with the criminal justice system. There are checks and balances, with cases being reviewed by a mix of council members who all have keen interest in holding law enforcement officers accountable. The Act 56 process needs to be adequately resourced and should be provided the opportunity to prove itself. Similarly, the present collaborative internal affairs investigative program, developed by the Vermont Chiefs of Police, is working but it needs additional resources, including, for example, an internal affairs coordinator and funding for the home agencies that train and offer investigators to other agencies for investigations. A better funded internal investigation process, together with an adequately resourced and fully implemented ACT 56 process, is a far better method than monetary lawsuits to achieve police professional regulation.

Another example of where funds can be better invested than litigation is enhanced services for persons in distress. Presently, police officers are often the only available resource to send when there is a 911 call related to a person in distress. Rather than sending police, there are times where specialized, non-police mobile crisis response staffed by people with lived experience of mental health challenges, mental health clinicians, and a nurse or EMT would be preferable, sometimes with and sometimes without police officers accompanying them. Implementing a program of this sort will require funding, however.

Conclusion. Qualified immunity is a limited protection for lower-level employees intended to allow them to perform their duties without a "flood of litigation" that could "inhibit" them from doing their job. The proposed legislation, which will expand the scope of viable monetary damage lawsuits against law enforcement officers and eliminates immunity defenses for those suits, is likely to inhibit law enforcement officers when performing their duties, make retention and recruitment

of law enforcement officers more difficult, and divert additional scarce monetary resources towards litigation. The proposed legislation will add substantial burden to taxpayers. There are far better uses of these scarce financial resources than removing the defense of qualified immunity.