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# THE ATTORNEY GENERAL'S SPONSORED BILL TO AMEND THE MASSACHUSETTS CIVIL RIGHTS ACT

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In November of 1979, the Massachusetts General Court enacted a law, known as the Massachusetts Civil Rights Act ("MCRA"), to increase the protections afforded the civil rights of persons in Massachusetts.<sup>1</sup>

The state legislature passed the Massachusetts Civil Rights Act amid growing concern about acts of racially motivated violence which were occurring with increased frequency in Massachusetts. Prior to the MCRA's enactment, there had been a dramatic, decade-long upsurge in racial harassment and violence stemming from the desegregation of Boston public schools and the resulting racial tension and hostility within the City of Boston.<sup>2</sup> The shooting of a black Jamaica Plain High School football player during half-time of a Charlestown High School football game in September 1979 became the catalyst for the legislature's passage of the bill.

Massachusetts civil rights statutes have been necessary to deter the increase in incidents of bias-motivated violence and intimidation in the Commonwealth. Bias-motivated crimes devastate far more than their particular victims. These crimes are often perceived as a personal attack against all members of the victim's race, ethnicity, gender, sexual orientation, disability, age, or religion. Bias-motivated crimes often polarize communities and neighborhoods and tend to lead to a cycle of retaliatory violence, even mass disturbances, requiring the expenditure of substantial law enforcement resources.

The MCRA contains both criminal<sup>3</sup> and civil components. The civil component of the MCRA had been sought by then-Attorney General Francis Bellotti

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<sup>1</sup> 1979 Mass. Acts 801 (approved Nov. 16, 1979, effective Feb. 1980). See MASS. GEN. L. ch. 265, § 37 (1990); MASS. GEN. L. ch. 12, §§ 11H and 11I (1986).

<sup>2</sup> See *Batchelder v. Allied Stores Corp.*, 473 N.E.2d 1128, 1130, 393 Mass. 819, 821 (1985).

<sup>3</sup> Beginning in 1980, the criminal component of the MCRA, embodied in MASS. GEN. L. ch. 265, § 37 (1990), was used by the Attorney General to prosecute individuals who used force or threats of force to violate the civil rights of others. By 1983, primary responsibility for criminal enforcement of the MCRA had devolved from the Attorney General to the District Attorneys.

and civil rights activists in recognition of the fact that the criminal justice system was insufficient to combat racial violence. While the criminal statutes could be used to prosecute individuals for past conduct, they could not necessarily prevent future similar acts.

The civil component of the MCRA<sup>4</sup> was directed primarily at enabling the Attorney General to obtain broad civil rights injunctions against perpetrators of bias-motivated violence, harassment, or intimidation. The MCRA, however, was written as a law of general applicability, providing for equitable relief from a violation of any civil right secured by state or federal law. The Act is not confined to the rights of particular groups or classes of individuals.<sup>5</sup> The Act was intended and has been used by the Attorney General as a weapon against those who commit any civil rights violation, whether sustained or sporadic, whether directed at its victim because of race, ethnicity, gender, sexual orientation, disability, age, or religion. Civil rights injunctions have acted as a powerful deterrent by, not only prohibiting perpetrators from future intimidation, harassment, or attacks upon victims, but also enjoining future harassing or intimidating conduct by the perpetrator, or anyone acting in concert with the perpetrator, against any member of the victim's group.<sup>6</sup>

Aggressive and thorough investigations, speedy arrests, swift prosecutions, and broad civil injunctions have been essential ingredients for sending a clear message to potential perpetrators that bias-motivated acts of harassment, intimidation, and violence will not be tolerated in Massachusetts. Since 1982, the Attorney General's office has obtained over 131 injunctions against more than 375 individual perpetrators who have used harassment and violence to interfere with secured rights. Since January 1991, the current administration has obtained thirty separate injunctions against ninety-six individual perpetrators of civil rights violations.

New federal and state laws now regulate the collection and periodic reporting of hate crime<sup>7</sup> and hate incident<sup>8</sup> data.<sup>9</sup> The Massachusetts Hate Crimes Reporting Act, effective in December of 1990, governs the collection of information regarding hate crimes, which are reported by police agencies, as well

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<sup>4</sup> MASS. GEN. L. ch. 12, § 11H (1986).

<sup>5</sup> See, e.g., *Bell v. Mazza*, 474 N.E.2d 1111, 1116, 394 Mass. 176, 184 (1985).

<sup>6</sup> See *Commonwealth v. Guilfoyle*, 521 N.E.2d 984, 985 n.4, 402 Mass. 130, 133 n.4 (1988).

<sup>7</sup> Hate crime is defined as "any criminal act coupled with overt actions motivated by bigotry and bias . . ." MASS. GEN. L. ch. 22C, § 32 (1993). Massachusetts Regulations define hate crime more broadly as "[a]ny criminal act which consists of conduct and not merely speech or expression and to which a bias motive is evident as a contributing factor . . ." MASS. REGS. CODE tit. 520, § 13.02(4) (1993).

<sup>8</sup> Hate incident is defined as "[a]ny act, whether consisting of conduct, speech, or expression, to which a bias motive is evident as a contributing factor, without regard for whether the act constitutes a crime." MASS. REGS. CODE tit. 520, §13.02(5) (1993).

<sup>9</sup> MASS. GEN. L. ch. 22C, §§ 33-35 (1993); MASS. REGS. CODE tit. 520, §13.03 (1993).

as information on hate incidents, which are reported by human rights and advocacy groups, to the Crime Reporting Unit of the Massachusetts Department of Public Safety. Since data reporting is voluntary and a number of police departments have not reported whether hate crimes have occurred in their communities, it is difficult to determine with certainty the actual number of hate crimes. Nevertheless, the data collected over the past two years reflects the continuing seriousness of the problems of bias-motivated activities occurring in Massachusetts. Three hundred and four hate crimes were reported by thirty-nine of the 350 city and town police departments, and 248 hate incidents were reported by human rights and advocacy groups in Massachusetts in 1991.<sup>10</sup> In 1992, 493 hate crimes were reported by seventy police departments and by other Massachusetts law enforcement agencies, including the MBTA and campus police.<sup>11</sup> An analysis of these statistics indicates that no city or town is immune to the hate activity that terrorizes and poisons a community. No community is safe from the reach of perpetrators of bias-motivated violence or purveyors of ideologies of hate, and no person is secure from becoming a victim of a hateful act.

In recognition of the continuing seriousness of this problem, the Office of the Attorney General has proposed a new law, H. 2453,<sup>12</sup> which would enhance the capacity of law enforcement to successfully deter violators of civil rights. H. 2453 would enable the Massachusetts Attorney General to seek compensatory damages on behalf of a victim of a civil rights violation and to collect the costs of litigation and reasonable attorneys' fees. Courts would also have the discretion to order a civil penalty of not more than ten thousand dollars against a defendant if bodily injury resulted from the violation of the civil rights law and a maximum of five thousand dollars if no bodily injury occurred.

Under the existing MCRA, only private attorneys have the ability to seek monetary damages on behalf of the victims.<sup>13</sup> With respect to such damages, there is no compelling reason to treat victims whose civil rights claims are litigated by the Attorney General's office differently from victims whose cases are handled by private attorneys. The proposed amendment would permit a civil rights case, a case involving important public policy interests and concerns, to be litigated wholly by the Attorney General rather than requiring the injunctive portion to be pursued by the Attorney General and the damages to be litigated by a private attorney, as occurs now. Often, actual damages are too low to create the financial incentive for private attorneys to initiate actions for damages in civil rights matters in which the Attorney General has sought injunctive relief. In such cases, the ability of the Attorney General to obtain

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<sup>10</sup> *Hate Crimes/Hate Incidents in Massachusetts*, 1991 DEP'T OF PUB. SAFETY ANN. REP.

<sup>11</sup> *Hate Crimes/Hate Incidents in Massachusetts*, 1992 DEP'T OF PUB. SAFETY ANN. REP.

<sup>12</sup> Full text appears in Appendix.

<sup>13</sup> See MASS. GEN. L. ch. 12, § 11I (1986).

an award of monetary damages would not only help compensate victims for pain and suffering and loss of rights, but would also provide additional disincentive to individuals who might interfere with the enjoyment of other people's civil rights.

Like private litigants, the Attorney General should have the discretion to seek attorneys' fees in civil rights enforcement actions. In addition to the reasons indicated above, there is another reason outlined in similar Massachusetts attorneys' fee statutes. Allowing the Attorney General to seek recovery of damages and attorneys' fees serves "the interrelated purposes of deterring illegal conduct in connection with these laws, and punishing those who violated the laws."<sup>14</sup>

The award of attorneys' fees would discourage defendants from raising insignificant claims or from unnecessarily prolonging a civil rights lawsuit. The lack of present authority to obtain attorneys' fees diminishes the Attorney General's bargaining power in attempts to resolve civil rights claims before trial. By contrast, defendants have a substantial incentive to settle meritorious civil rights claims advanced by private counsel under Massachusetts General Law ch. 12, sec. 11I (regardless of the amount of damages) because of their exposure to attorneys' fees and costs of litigation. The attorneys' fee provision would add a new bargaining tool which would facilitate pretrial settlement of appropriate cases.

In 1990, the Attorney General was granted the authority to obtain compensatory damages on behalf of victims and attorneys' fees for the Commonwealth in housing discrimination claims brought under Massachusetts General Law ch. 151B, sec. 5.<sup>15</sup> Under this statutory provision, the public policy embodied is apparent — the vindication of rights against discrimination necessitates the award of both damages to victims and attorneys' fees to the Commonwealth. The record of the Civil Rights Division of the Attorney General's Office in effectively settling virtually all of its housing discrimination claims since 1990 prior to trial, is largely a testament to the impact that the attorneys' fee provision has had in persuading defendants not to engage in protracted litigation of victims' meritorious claims.

The Office of the Attorney General incurs costs both monetarily and in the expenditure of limited attorney and staff resources. Although the Attorney General has the dual responsibility of defending the Commonwealth and of protecting the public interest, it is necessary to establish priorities. This maximizes the Attorney General's ability to address all issues or problems it could confront. The recovery of costs in civil rights actions would provide the Attorney General with additional resources, permitting the expansion of actions in

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<sup>14</sup> *Lincoln Street Realty Co. v. Green*, 373 N.E.2d 1172, 1173, 374 Mass. 630, 632 (1978); see also *Perez v. University of Puerto Rico*, 601 F.2d 1, 2 (1st Cir. 1979); *Lund v. Affleck*, 442 F. Supp. 1109, 1112 (D.R.I. 1977), *aff'd*, 587 F.2d 75 (1st Cir. 1978).

<sup>15</sup> 1989 Mass. Acts 722 (approved Jan. 13, 1990).

the public interest, on behalf of victims of civil rights violations. It would also attempt to shift the burden of paying for civil rights actions from the taxpayer to the perpetrator.

An important feature of the proposed H. 2543 is that civil penalties, attorneys' fees or costs that are recovered would be deposited in a special fund. The fund would be used to finance future civil rights actions by the Attorney General, to educate the residents of Massachusetts as to their civil rights, and to finance the development and implementation of model civil rights and law enforcement training programs.

Education and prevention are essential parts of an effective civil rights enforcement strategy. In the past two and one-half years, the Civil Rights Division has sponsored a number of education and training programs of police departments, clerk magistrates, human relations commissions, community advocacy groups, as well as high school students throughout the Commonwealth. These programs aim to ensure an appropriate response from law enforcement to civil rights violations, to encourage cooperation by victims with law enforcement throughout the criminal and civil injunctive process, to deter potential future bias-motivated conduct, and to promote greater tolerance of cultural, racial, religious, and linguistic diversity in neighborhoods and schools. Much more, however, needs to be done. The special fund would permit a proactive approach to prevent future violence.

The special fund is similar to the model established by the General Court under Massachusetts General Law ch. 93, sec. 14 for the Antitrust Division of the Attorney General's office and under Massachusetts General Law ch. 12, sec. 11G for the Consumer Protection Division of the Attorney General's office. Other similar funds include the Environmental Challenge Fund<sup>16</sup> and the Toxics Use Reduction Fund.<sup>17</sup> Pursuant to the antitrust statute, fees obtained are placed by the state treasurer in a separate fund account to be utilized to finance future antitrust actions.<sup>18</sup>

The Office of the Attorney General is committed to a swift and effective response to civil rights violence and harassment. The Office of the Attorney General will continue to use the MCRA toward this end. Additional authority, however, is needed. The proposed changes in the Massachusetts Civil Rights Act would constitute a powerful symbol of the Commonwealth's strong and unwavering commitment to the civil rights of all individuals, while providing additional tools for the Attorney General to combat bias-motivated and other civil rights violations.

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<sup>16</sup> MASS. GEN. L. ch. 29, § 2J (1992).

<sup>17</sup> MASS. GEN. L. ch. 29, § 2K (1992).

<sup>18</sup> The proposed statute also provides that at the end of each fiscal year the amount in the special fund which exceeds \$700,000 shall be returned to the General Treasury.

## APPENDIX

House No. 2453

AN ACT RELATIVE TO THE PROTECTION OF THE CIVIL RIGHTS OF PERSONS IN THE COMMONWEALTH.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows: [sic] —

Section 11H of Chapter 12 of the General Laws 1990 Edition, as appearing in the following paragraph:

In addition to injunctive and equitable relief, the attorney general may seek compensatory and punitive money damages on behalf of the aggrieved person or persons.

The Commonwealth, shall, in addition to other relief provided for by this section and irrespective of the nature of the relief sought or the amount in controversy, be entitled to an award of the costs of the litigation and reasonable attorneys fees in an amount to be fixed by the Court.

If the Commonwealth prevails in its claim for injunctive relief or for money damages, a civil penalty may also be assessed by the Court and awarded to the Commonwealth. If assessed [sic], the civil penalty shall be in an amount not to exceed five thousand dollars against a defendant.

There shall be established and set up on the books of the Commonwealth a separate fund, to be known as the Civil Rights Enforcement Fund. There shall be credited to such fund all money received by the Commonwealth from attorneys fees, costs and civil penalties as a result of actions brought by the attorney general pursuant to this statute. Amounts credited to such fund shall be provided to the attorney general for the payment of expenses and resource costs incurred by the attorney general in connection with the enforcement of the civil rights laws of the Commonwealth, civil rights training, including the training of law enforcement personnel, and public education. At the end of any fiscal year, if the balance in the Civil Rights enforcement [sic] Fund exceeds seven hundred thousand dollars, the excess shall be withdrawn from the fund and deposited in the General Fund.