

TOWN OF BROOKLINE
 ADVISORY COMMITTEE AD HOC SUBCOMMITTEE
 REPORT ON WARRANT ARTICLES 12 AND 13
 May 15, 2022 (Preliminary)

From Tuesday, April 12 to Tuesday, May 17, 2022, an Ad Hoc Subcommittee of the Advisory Committee held one public hearing and four public meetings¹ on Warrant Articles 12 and 13.

Attending all meetings were Subcommittee Chair David Pollak; Subcommittee members Amy Hummel, Neil Gordon, Susan Granoff, and Scott Ananian; Advisory Committee Chair Dennis Doughty; petitioner Sandy Batchelder; and Town Counsel Joe Callanan. In attendance at one or more meetings were petitioners Deborah Brown and Mariah Nobrega; Advisory Committee Vice Chair Carla Benka; Chief Diversity Officer Lloyd Gellineau; Ann Braga, CTOS members Jean Berg (Chair), Betsy DeWitt, and Dick Benka; Town Meeting Members Bonnie Bastien, Arthur Conquest, Katherine Florio, Perry Grossman, Lynda Roseman, Kate Silbaugh, Cornelia van der Ziel, and Paul Warren; and Associate Town Counsel Michael Downey.

Recommendation: (Pending)

Executive Summary:	Warrant Article 12 amends the Town’s By-Law 3.14 relating to Diversity, Inclusion and Community Relations to create a new quasi-judicial Complaint Committee (“CC”) and process for the Town of Brookline to investigate discrimination complaints, make determinations of whether discriminatory acts were committed as alleged, and mete out penalties of up to \$300 per day in fines (in the petitioners’ version). Warrant Article 13 would apply these procedures to complaints of discrimination in violation of the Town’s Fair Housing By-Law (Article 5.5). WA 13 will not be moved at TM if WA 12 fails to pass.
Voting Yes will...	Create a new Complaint Committee to address complaints of discrimination in Brookline.
Voting No will...	Allow the bylaw changes passed by 2019 Special Town Meeting to be enacted as of July 1. This will create similar responsibilities but assign the work to the Commission for Diversity, Inclusion and Community Relations, rather than a separate committee, and would lack the detailed development that is articulated in WA 12 and 13.
Financial impact [if any]	The Department Director has estimated the annual additional cost to administer this at \$200,000. Town Counsel has indicated that there would be additional costs to develop policies and procedures, and to develop a training program and train the members of the new committee. If there are lawsuits against the Town questioning the legality of WA 12 or any decisions made under its authority, the Town would also incur an unknown amount of additional legal defense expenses as well as the cost of judgments against the Town should the Town lose any of these lawsuits.
Legal	Town Counsel has articulated significant concerns about legal risks. Many of

¹ Public hearing: April 12; Public meetings: April 27, May 4, May 11, May 17

implications [if any]	these have been addressed in the redrafting of the Warrant Article. However, Town Counsel has stated that it is his expectation that it is likely that the legality of the bylaw will be challenged once adverse findings are made, and particularly if fines are levied.
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SUMMARY

- During the past several weeks Article 12 has undergone significant changes due to ongoing discussions between the petitioners and members of the Committee on Town Organization and Structure (CTO&S) to address concerns raised by CTO&S as well as the AC Subcommittee.
- The Subcommittee was supportive both of the process of these changes and of the majority of the changes, but the Subcommittee’s draft motion still diverges from the latest motion offered by petitioners. We include appendices which show: (1) a clean version of the Subcommittee motion, (2) a redlined version of the Subcommittee motion showing the differences between the current bylaw and the Subcommittee motion, (3) a redlined version of the Subcommittee motion showing the differences between the petitioners’ motion and the Subcommittee motion.
- There is strong support on the Subcommittee that its version is “better” than either the motion as originally filed or the most recent petitioners’ motion; however there is only weak support on the Subcommittee for the notion that any version of Article 12 is better than the status quo. More on this below.
- [There are likely to be two competing motions offered at Town Meeting, one from the petitioners and one from the Advisory Committee.]

BACKGROUND

At the 2019 Special Town Meeting, Town Meeting passed Warrant Article 24, which amended Article 3.14 to mandate that upon receiving an allegation of discrimination, the Commission for Diversity, Inclusion and Community Relations (CDICR) must investigate the complaint and issue a report. This article did not define the specifics of how such an investigation would take place, what an appeal process might look like, or what penalties if any could be levied. Because of acknowledged concerns about the specific language of the Bylaw change, WA 24 included an 18-month delay in implementation of the changes and charged CDICR with working out the details in the interim.

That work was not able to be completed on schedule, and at the 2021 Annual Town Meeting, Town Meeting passed Warrant Article 13, which delayed the implementation of the above mandate for an additional year until July 1, 2022.

Thus, it should be noted that (unless otherwise amended) the choice provided by this Article is not between the “status quo” and the provisions described herein; rather it is the choice between the unspecified investigative procedure passed in 2019 and delayed until this July and the provisions described herein.

Since the passage of Article 24 in 2019, CDICR has conducted a review of peer communities to review best practices for investigating discrimination complaints. The most comprehensive process is employed by the City of Cambridge, which has an investigative commission staffed by trained lawyers and which has a large budget at its disposal.

During the review and planning process, a number of issues were raised; Articles 12 and 13 endeavored to address many of these, including the following:

- * What should happen if a complaint is brought against a Town employee?
- * Is the goal of this process to “levy fines” or to “change behavior”?
- * What is a reasonable fine structure?
- * What should an appeals process look like?
- * How can the rules of this process be enforced, and by whom?
- * How is this process influenced by the rules of evidence and court procedures and how could this process influence subsequent legal action?

DISCUSSION

During the public hearing and public meetings on these Articles, the Subcommittee raised a number of the above questions along with many other concerns. A summary of the discussion follows, grouped by category:

Legal Exposure

Several Subcommittee members had serious reservations about the proposed procedure, citing concerns about:

- * How the Complaint Committee would be staffed (“historically marginalized” is not well defined)
- * How the Complaint Committee would be trained (“members would need to be well versed in appropriate legal practices but do not appear to be required to have any relevant training”)
- * What the legal exposure for the Town could be in the event that the investigative committee failed to follow due process

Town Counsel repeatedly expressed the following opinions:

- The Town will likely be sued once investigations start and rulings are issued; the Town will almost certainly be sued if fines are issued
- There are two cases which inform this debate: *Bloom vs. Worcester* and *Marshal House*. Town Counsel believes that the constraints implied by these cases mean that the Town might be able to issue a fine to a nail salon (for example) but would be unlikely to issue fines to a bank for lending practices or to many employers over hiring practices.
- The risks associated with setting up procedures which violate the law are high enough that — no matter what is written in the bylaw — Town Counsel will hire outside counsel, trained in this area of the law, to write the rules which the Complaint Committee must follow.
- Similarly, Town Counsel will take responsibility for providing training to all parties.
- The phrase “to the extent permissible by law” probably gets the bylaw through the required review by the Attorney General’s Office (AGO), but it is likely that it will be caveated with the

suggestion “check with Town Counsel” for interpretations, which begs the question of whether such a phrase adds any value in the statute.

- There are enough statutes which govern behavior within the schools that it is the preference of Town Counsel that this bylaw not be applied to schools at all.
- Town Counsel also suggested that all definitions related to discrimination, protected classes, etc. should come from State Law and that the town should not attempt to go farther than the State.

Advocacy vs. Enforcement

During the petitioner’s opening remarks references were made to “providing a favorable forum for complainants”. Several Subcommittee members expressed the opinion that it appeared that CDICR was trying to simultaneously be an advocate for citizens who believe they have experienced discrimination as well as the body which adjudicates whether those same citizens have experienced discrimination, which made those members quite uncomfortable. In addition, Subcommittee members expressed the opinion that the word “fair” appeared to be used exclusively to describe fairness from the perspective of the complainant and did not take into account the needs or rights of the respondent.

Standing and Subpoena power

Perhaps the most heated comments came when discussing the provisions of this Article which allow discrimination complaints to be brought by otherwise uninvolved third parties and on behalf of a class of individuals, whether or not any allegedly affected individual approves of the complaint. Subcommittee members felt this opened up significant avenues for abuse. Similarly, subpoena power in response to a complaint that was not filed under oath was felt by many to be unfair.

Committee Structure and Staffing

The Subcommittee expressed concerns that it would be difficult, if not impossible, to find volunteers to serve on the Complaint Committee, given the legal hurdles described above. In addition, concerns were raised that there were not enough members on the Complaint Committee to properly implement the proposed processes, especially in the event of an appeal, in which committee members who had participated in the original ruling would be expected to recuse themselves.

Cost

The Chief Diversity Officer has estimated that the cost to implement this Article would include: 2 additional FTE to support the program at a cost of \$200,000/year in support infrastructure. Town Counsel notes that significant training would be required for the Complaint Committee members but to date has not offered an estimate of the training costs.

Unclear language

One Subcommittee member described a hypothetical hate crime and asked whether it could be investigated as discriminatory under this bylaw. Petitioner acknowledged that it probably could not, but that not all bad behavior is “discriminatory.” Other Subcommittee members expressed concern that a \$300/day fine without adequate explanation of how the number of days would be determined was a recipe for disaster.

Public comment

Several members of the public expressed their own concerns

Paul Warren, TMM-1: *When I read this I was taken aback. I think the most telling thing is what keeps being repeated by the petitioner. It's intended to change behavior. To what standard? Who defines the standard? A committee appointed by another appointed committee with no responsibility to the voters. It's difficult to understand what behavior we are trying to change to what standard.*

Lynda Roseman, TMM-14: *I was also shocked. Let's say someone charges me with discrimination of some kind. What if I say no? Who enforces the subpoenas?*

Kate Silbaugh, TMM-1: *I just want to say that a lot of these powers are normal in law but not normal in a volunteer government structure. I would NEVER serve on this committee because I'd be afraid of violating people's rights. The courts and state agencies are set up to handle this properly. I'm not sure Brookline, as a Town, is really set up to do so. People will get in over their heads.*

Re-Drafting

CTOS has also held several public meetings on these articles raising a long list of concerns. After extensive back-and-forth with the petitioners, a version of Article 12 was produced which attempted to address concerns around:

- Appointing Authority. The revised draft has a clean separation between the complaint committee and the diversity commission. This addresses the concern that because of the role of the diversity commission in performing advocacy and outreach, it is inappropriate for the diversity commission to also be responsible for selecting the individuals who investigate and adjudicate complaints. The revised motion has the Select Board as the appointing authority.
- Authority over CC rules of procedure. The revised draft has the CC and Town Counsel responsible.
- Legal standard for statements. The revised motion includes language that requires complaints to be made under oath.
- Standing. The revised motion disallows third-party and class action complaints.
- Privacy rights. The revised motion preserves the rights of all parties.
- Size of the Complaint Committee. The revised draft increases the maximum number of members from five to seven in order to address concerns about recusals, and other issues that might make it difficult to seat three members on an appeals board while not including the member who had been part of the investigation.

Additional Discussion

Dick Benka of CTOS provided a roadmap for the remaining points of contention. The Subcommittee considered each of these in depth:

Fines. As mentioned above, Town Counsel believes that at best there is a quite narrow category of businesses for which it might be permissible to issue fines under this bylaw. For the most

part, subcommittee members agree with this concern (particularly the question of whether fines are equitable) and by a 4-1 margin voted to remove the fine language from the motion. (Mr. Ananian in dissent.)

Subpoena power. The original concern over subpoena power was that it's a powerful tool if not appropriately constrained. The changes regarding standing, legal standard for statements, and privacy rights, coupled with Town Counsel's assertion that no subpoena would ever be enforced without a process involving Town Counsel, the Select Board, and the courts, the majority of the subcommittee voted (4-1) against removing subpoena power from the committee. (Ms. Hummel in dissent.)

Applicability to the schools. An extensive debate was held by the Subcommittee on May 11 in which no final wording could be agreed to. Instead, the Subcommittee voted 4-1 (Mr. Ananian in dissent) in favor of the following resolution: *RESOLVED: That language be drafted for this Warrant Article to ensure that the Schools be eliminated from the jurisdiction of the Article.* On Tuesday, May 17, new language was to be presented and voted by the Subcommittee; the results of that vote will be discussed at the Advisory Committee meeting immediately following.

Rule making authority. (*subsequently addressed in the 5/14 revision provided by Dick Benka*): Ms. Granoff identified a drafting inconsistency in which rule-making authority was assigned, in separate clauses, to the Complaint Committee or to the Commission. As mentioned earlier, the Subcommittee was generally in favor of the separation of powers between the two, and during the debate on May 11 the majority felt that the responsibility for drafting rules for the complaint process should fall to the Complaint Committee, and ultimately to the approval of the Select Board. However, it was pointed out again by Town Counsel that no matter **who** had the formal responsibility, the actual language would almost certainly come from Town Counsel, via consultation with outside counsel, and that this might be more of a theoretical concern than a practical one. By a vote of 3-0-2 (Messrs Ananian and Pollak abstaining), the subcommittee voted in favor of the following resolution: *RESOLVED: That language be drafted for this Warrant Article that removes the Commission's role in rulemaking as it relates to the complaint and appeals process (including all states from initial complaint to final disposition) and assigns it to the Complaint Committee and/or the Select Board.* On Tuesday, May 17, new language was to be presented and voted by the Subcommittee; the results of that vote will be discussed at the Advisory Committee meeting immediately following.

Recommendation

Pending