

VERMONT JUDICIARY COMMISSION ON DIVERSITY, EQUITY, AND INCLUSION

Chief Justice Paul Reiber and Associate Justice Nancy Waples, Co-Chairs

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Commission's First Report to the Vermont Supreme Court

March 30, 2023

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Introduction

The Vermont Supreme Court established the Judiciary Commission on Diversity, Equity, and Inclusion (the Commission) in January of 2022. According to its Charge and Designation, the Commission’s overarching purpose is “to advance racial and social equity in pursuit of equal justice under the law,” with an “aim ... to broadly identify disparities in our justice system, understand the causes, evaluate solutions, and implement changes.”¹

The Commission is co-chaired by Chief Justice Paul Reiber and Associate Justice Nancy Waples. The membership of the Commission is as follows:

- Chief Justice Paul Reiber, Co-Chair
- Associate Justice Nancy Waples, Co-Chair
- Judge Alison Arms
- Julie Bronson – Court Operations Manager
- John Campbell – Executive Director, Department of State’s Attorneys and Sheriffs
- Associate Justice William Cohen
- Xusana Davis – Director of Racial Equity
- Robert Fletcher – Immediate Past President, Vermont Bar Association
- Scott Griffith – Chief of Planning and Court Services, Vermont Judiciary
- Erin Jacobsen – Co-Director, Community Justice Division, Office of the Attorney General
- Judge Mary Morrissey
- Rebecca Turner – Appellate Defender, Office of the Defender General
- Margaret Villeneuve – Regional Superior Court Clerk
- Chief Superior Judge Thomas Zonay

The Commission’s work is guided by an Executive Committee, which includes Chief Justice Paul Reiber, Justice Nancy Waples, Justice William Cohen, Chief Superior Judge Thomas Zonay, and Scott Griffith.

Additional information about the Commission’s work is available on the Judiciary’s website.²

Commission Operations

Deliverables

The Commission’s Charge and Designation calls for it to deliver a series of reports to the Supreme Court, as follows:

¹ Available at <https://tinyurl.com/2ex6tyff>.

² See <https://www.vermontjudiciary.org/about-vermont-judiciary/vermont-judiciary-commission-diversity-equity-and-inclusion>.

1. Understand the Issues: By 3/31/23, the Commission shall submit its First Report to the Court with specific proposals to:
 - a. Identify data gaps and recommend new data collection measures in areas within the courts to evaluate systemic and institutional inequalities or disparities that may exist.
 - b. Collaborate with partners to solicit and obtain input from the legal profession and the community at large regarding diversity, equity, and inclusion issues in the Judiciary.

2. Evaluate potential solutions: By six months following submission and acceptance by the Court of the First Report, the Commission shall submit its Second Report to the Court, which shall include:
 - a. Recommended solutions to address identified inequities and disparities and remove barriers to achieve desired outcomes.
 - b. Evaluation of current diversity, equity, and inclusion practices within the Judiciary.

3. Take action: By six months following submission and acceptance by the Court of the Second Report, the Commission shall submit its Third and Final Report to the Court with specific proposals to:
 - a. Implement recommended solutions through measures approved and overseen by the Commission, including recommendations for legislation or rule change.
 - b. Implement measures to evaluate effect of changes towards desired outcomes.

This report is in response to the first reporting requirement.

Structure

The Commission formed three workgroups to advance its work. These are described below.

Community Engagement Committee

The Community Engagement Committee is focused on creating a dialogue with the public that will: 1) help increase the community's understanding of the Judiciary; 2) enable court leaders to gain an understanding of how it is viewed by the community; and 3) deepen partnerships with community stakeholder groups.

The Community Engagement Committee is chaired by Chief Justice Paul Reiber and includes the following members:

- Xusana Davis
- Robert Fletcher
- Scott Griffith
- Erin Jacobsen
- Chief Superior Judge Thomas Zonay

The Community Engagement Committee is hosting a community forum in each county. Six forums have been held to date. Information about these events is presented in the “Input Received Regarding DEI Issues in the Judiciary” section below.

Administration and Operations Committee

The Administration and Operations Committee is examining the Judiciary’s administrative and operational policies to assess possible disparate equity impact(s) in their design or implementation. Examples of the practices and policies to be reviewed include, but are not limited to the following:

- New employee recruitment, screening, and selection
- Employee and judge training
- Jury operations
- The design of court programs and the delivery of court services
- Internal and external communications and reporting
- Judiciary strategic planning

The Administration and Operations Committee is chaired by Justice Nancy Waples and includes the following members:

- John Campbell
- Scott Griffith
- Judge Mary Morrissey
- Margaret Villeneuve

Data Committee

The Data Committee is examining the existence and use of Judiciary data related to race, gender, and ethnicity. In undertaking this work, the Data Committee is reviewing the Judiciary’s data systems and its data planning, governance, sharing, and reporting practices. In addition, the Data Committee is studying data collection best practice documents from the National Center for State Courts and practice guides and research from other entities.

The Data Committee is chaired by Justice William Cohen and includes the following members:

- Judge Alison Arms
- Julie Bronson
- Scott Griffith
- Rebecca Turner

Review of Judiciary Operations and Services

As a way of organizing its work the Commission elected to use the Organizational Assessment Tool for Courts (OAT) developed by the National Center for State Courts. The OAT was created to assist courts in their efforts to ensure a diverse, equitable, and inclusive workplace that delivers on the promise of equal justice for all. It is a framework for 1) assessing the current state of court policies and practices, and 2) developing a data-driven plan for learning and improvement in pursuit of these ideals.

The OAT is as an interactive web-based self-assessment which generates a report with recommendations once it has been completed. The recommendations include reference to research and other materials to assist courts in addressing areas of need.

The OAT contains over 50 questions. It is divided into several sections, which were assigned to one of each of the Commission's committees to review and answer, as follows:

- I. Judicial Commitment, Vision, and Leadership (Executive Committee)
- II. Capacity for Community-Based Learning and Data Driven Decision-Making
 - a. Community Engagement (Community Engagement Committee)
 - b. Administrative Data (Data Committee)
- III. The Bench and Court Workforce (Administration and Operations Committee)
 - a. Recruitment
 - b. Hiring
 - c. Development
 - d. Retention
 - e. Promotion
- IV. Court Services (Administration and Operations Committee)
 - a. Accessible and Responsive Court Services for Your Community
 - b. Equitable Court Outcomes

The Commission completed the OAT in late February and the committees will review the report generated in response. This review will frame the next phase of each committee's work.

Data Gaps and Data Collection

The Data Committee has prepared a memo on its work to date, which addresses the issue of data gaps and data collection. The memo is attached to this report as *Attachment 1*.

Input Received Regarding DEI Issues in the Judiciary

The Commission’s Community Engagement Committee has hosted six public forums to date. See Table 1 below for details.

Court Administrator’s Office staff are compiling a list of contacts in each county and sending them an invitation to participate in the forum in their county. The contact lists include media contacts. A flyer has been created for each event, which is distributed to each recipient on the contact list. The forums are also promoted on the Judiciary’s social media platforms, targeted to reach residents of each county. The list of contacts for all counties totals over 1,400.

Forums have been scheduled in all counties except Grand Isle. Details about the forums are on the Commission’s webpage, accessible via the “Community Forums” link.

Table 1. Community forums held to date

Date	County	Location	Participants In-Person	Participants Online	Link to Recording
12/6/22	Chittenden	Fletcher Free Library (Burlington)	32	N/A	N/A
12/13/22	Chittenden	O’Brien Community Center (Winooski)	10	N/A	N/A
1/19/23	Bennington	Criminal and Family Courthouse (Bennington)	21	16	https://tinyurl.com/mhuethhr
3/9/23	Windsor	Criminal and Family Courthouse (White River Junction)	7	14	https://tinyurl.com/4vn5z8ts
3/16/23	Rutland ³	Civil and Probate Courthouse (Rutland)	22	1	https://tinyurl.com/y3ue578b
3/28/23	Lamoille	Lamoille County Courthouse (Hyde Park)	7	3	https://tinyurl.com/yv4skszz
Total to date⁴			99	34	

³ A technical malfunction with the Webex link for the Rutland forum resulted in the inability of some parties being able to join the event remotely. All invitees to the Rutland forum have been provided with a link to the recording of the forum and notified how to participate in upcoming forum.

⁴ Exclusive of Judiciary staff. Numbers are approximate.

Below is a summary list of comments provided by participants at the forums. The list also includes items submitted to the Commission in writing outside of a scheduled event.

- The Commission should recognize the issue of poverty as a matter of equity and consider the impact that poverty has on an individual's ability to access the courts.
- The Judiciary should consider the particular vulnerabilities of people who are poor and marginalized in any review of court services or processes.
- The full range of resources available to provide support to and advocacy for those needing help accessing the courts is missing or insufficient.
- More information for the public about how the (court) system works is needed.
- Judge and staff training on cultural sensitivity is needed.
- A more diverse Judiciary workforce is needed.
- Juror orientation efforts should be updated and culturally sensitive.
- Remote access to court proceedings and court services is not equal access; the Judiciary should avoid overreliance on remote access.
- The Commission should be results-oriented in this work; the Commission should avoid spending too much time on fact-finding and information gathering.
- The process used to secure American Sign Language interpreters should be streamlined.
- The Judiciary should work with the Legislature to address justice system resource needs.
- Some court users feel unwelcome, intimidated, or confused in coming to court; the Judiciary should consider the use of "Ambassadors" or "Navigators" to provide assistance.
- The Commission should consider a range of venues – not just courthouses – when creating opportunities for public engagement.
- Collecting race data on court users is important but challenging.
- A lack of resources for counsel in child dependency matters can impact cases in the Family Division.
- An assessment of the source and impact of the drug problem on Vermont's communities is needed.
- Procedural differences exist in cases in which a guardian is appointed.
- Court proceedings can sometimes feel rushed.
- The Judiciary's website should provide clearer information about court processes.

Conclusion and Next Steps

The Commission is grateful to members of the local communities who have participated in the forums. Their input is key to informing the Commission's work. Commission members would also like to thank Judiciary staff for their role in organizing and supporting the events, which will continue into the summer. A schedule of forums and a link to those that have been recorded is on the Commission's page of the Judiciary website.

While the public forums are ongoing the Commission's committees will be reviewing the results of the OAT and building action plans on the basis of the results, as well as other information.

Attachment 1: Memo from the Data Committee

MEMORANDUM

TO: Members of the Vermont Judiciary Commission on Diversity, Equity, and Inclusion
FROM: Data Committee, Justice William Cohen, Chair
DATE: Tuesday, March 28, 2023
RE: Data Collection Primer and Report⁵

I. INTRODUCTION

The Vermont Judiciary Commission on Diversity, Equity, and Inclusion (hereinafter “Commission”) is charged with “advance[ing] racial and social equity in pursuit of equal justice under the law,” by “broadly identify[ing] disparities in our justice system, understand[ing] the causes, evaluat[ing] solutions, and implement[ing] changes.”⁶ One facet of this work is “[i]dentify[ing] data gaps and recommend[ing] new data collection measures in areas within the courts to evaluate systemic and institutional inequalities or disparities that may exist.”⁷ To that end, the Commission established a Data Committee to “examine the existence and use of Judiciary data related to race, gender, and ethnicity and make recommendations to the Commission regarding ways to improve the acquisition, accuracy, and utility of key data to advance the Commission’s goals.”⁸

The Commission’s charge and designation calls for it to submit a series of reports to the Supreme Court. A key element of the first report is to “identify data gaps and recommend new data collection measures in areas within the courts to evaluate systemic and institutional inequalities or disparities that may exist.” This memo was prepared as a preliminary response to this element of the charge and designation and to memorialize the Data Committee’s discussions to date.

This memo is organized into several substantive parts. Following this introduction, background on the Committee’s structure and scope of work is provided. After that, detail regarding how the Committee undertook its work is summarized. That section is followed by a

⁵ The Data Committee supports the Vermont Judiciary designating the Commission as a standing committee and therefore considers this work ongoing. This memo will be the first of a series of reports about the Data Committee’s work.

⁶ Vt. Judiciary Comm. On Diversity, Equity, and Inclusion, Charge and Designation (adopted Jan. 24, 2022, amended Jan. 9, 2023).
<https://www.vermontjudiciary.org/sites/default/files/documents/Vermont%20Judiciary%20Commission%20on%20Diversity%2C%20Equity%2C%20and%20Inclusion%20-%20Charge%20and%20Designation%20%28rev.%201-9-23%29.pdf> [https://perma.cc/TR4L-R5R7] [hereinafter charge and designation].

⁷ Charge and designation.

⁸ Vt. Judiciary Comm. On Diversity, Equity, and Inclusion, Committee Structure,
https://www.vermontjudiciary.org/sites/default/files/documents/Judiciary%20DEI%20Commission%20Committee%20Structure%20%28rev%29_0.pdf [https://perma.cc/4884-6GUX] [hereinafter Committee Structure].

presentation of practical questions regarding data collection, after which a preliminary and summary list of recommendations is offered.

II. BACKGROUND

The Data Committee (hereinafter “Committee”) is chaired by Justice William Cohen of the Vermont Supreme Court and has four members: Vermont Judiciary Chief of Planning and Court Services Scott Griffith, Judge Alison Arms of the Chittenden County Superior Court, Court Operations Manager Julie Bronson, and Attorney Rebecca Turner of the Office of the Defender General.⁹ In carrying out its charge, the Committee reviewed research “from the Council of State Governments,¹⁰ the Crime Research Group,¹¹ and other entities that have conducted empirical research on the Vermont justice system,”¹² such as the Vermont National Criminal Justice Reform Project Report¹³ and the Chief Superior Judge Report to the Vermont Legislature on Collection of Racial Data in Civil Court Filings.¹⁴ The Committee has also “consult[ed] experts in the area of data-driven practices that are likely to advance the Commission’s goals.” This has included a review of research and reference material on the topic from the National Center for State Courts (NCSC),¹⁵ University of Pennsylvania’s Actionable Intelligence for Social Policy (AISP),¹⁶ and State of Vermont Office of Racial Equity.¹⁷

Per the Commission’s charge and designation, the Committee’s goal is to improve the Judiciary’s collection of data related to court users’ race, gender, and ethnicity. However, addressing bias and prejudice within a system will first require that the Commission and the Vermont Judiciary in general consider how this work will advance the Commission’s overall goals. As one data collection guide notes, “how we collect data reflects our organizations’ values—it can either unintentionally reinforce harmful stereotypes and perpetuate inequality and

⁹ *Id.*; Vermont Judiciary, About the Vermont Judiciary: Vermont Judiciary Commission on Diversity, Equity, and Inclusion <https://www.vermontjudiciary.org/about-vermont-judiciary/vermont-judiciary-commission-diversity-equity-and-inclusion> [https://perma.cc/7J5M-ZEEL]. Robin Joy, Ph.D., from the Crime Research Group, has attended most of the Committee’s meetings.

¹⁰ The Council of State Governments, <https://www.csg.org/>.

¹¹ Crime Research Group, <https://www.crgvt.org/>.

¹² Committee Structure at 2.

¹³ Vermont’s National Criminal Justice Report Project (NCJRP) Report: The Need and Plan for Data Integration, 2022. On file with Data Committee members.

¹⁴ Chief Superior Judge Thomas Zonay, Report to the Vermont Legislature: Report on Collection of Racial Data in Civil Court Filings (Dec. 1, 2022) <https://legislature.vermont.gov/assets/Legislative-Reports/Report-on-Collection-of-Racial-Data-in-Civil-Court-Filings-H.729-Act-147-sec.-32-2002.pdf>.

¹⁵ National Center for State Courts, Blueprint for Racial Justice, <https://www.ncsc.org/consulting-and-research/areas-of-expertise/racial-justice/blueprint-for-racial-justice>. Working drafts of NCSC’s Racial Justice Organizational Assessment Tool (OAT) for Courts [hereinafter OAT] and its related guidance [hereinafter OAT Guidance for Courts (draft)] were provided to the Commission on Oct. 28, 2022, for the purposes of pilot testing and are on file with various Commission members.

¹⁶ Amy Hawn Nelson et al., University of Pennsylvania, Actional Intelligence for Social Policy (AISP), Toolkit for Centering Racial Equity Throughout Data Integration (2020) https://aisp.upenn.edu/wp-content/uploads/2022/07/AISP-Toolkit_5.27.20.pdf, [https://perma.cc/TGF4-WZMX].

¹⁷ Jay Greene, State of Vermont Office of Racial Equity, Resources for Equitable Data Collection by the Vermont Judiciary (Dec. 5, 2022) (on file with Data Committee).

bias, or strive to promote inclusion and equity.”¹⁸ Further, although the Committee assumes that the Judiciary intends to eventually use these collected data to assess and address bias, the Committee acknowledges that it cannot currently answer questions about who will have access to the information and how exactly it will be used.¹⁹ The Committee therefore notes that there are many other considerations related to the broader Commission’s goals that inevitably will inform this Committee’s efforts. As a result, this preliminary report is a part-intellectual and part-practical exercise, and it relies and draws upon data experts’ best practices to establish the below methodologies and recommendations.

In evaluating current and future data collection, the Committee drew upon resources developed by the National Center for State Courts (NCSC), particularly its Racial Justice Organizational Assessment Tool for Courts (OAT). The OAT is comprised of a set of assessment questions and corresponding guidance through which state courts may critically examine their efforts to combat racial prejudice and achieve racial justice.²⁰ The Vermont Judiciary submitted responses to the OAT’s assessment questions in February 2023 and received from NCSC a summary report containing responses and guidance.

As a preliminary matter, the Committee recognizes that race, gender, and ethnicity are sensitive identities that many Vermonters may hesitate to disclose to government entities unless necessary (such as gender on the current Vermont driver’s license format). Members of groups that have faced discrimination at the hands of governments, institutions, and broader societal structures may fear further prejudice, including denial of rights or acts of violence, if they publicly disclose their marginalized identities.²¹ Hearing the perspective of these individuals is an important component of the Commission’s work. In addition to the community forums that the Commission’s Community Engagement Committee is hosting, the Commission might consider including community members on the Commission’s committees. The Committee further notes that community members who participate in this work should be compensated for their time and expenses; this points to the need for setting aside funds to support the work of the Commission.

Although the Committee endorses the notion that data collection creates “[t]he potential to better serve all segments of the community,”²² it acknowledges any potential apprehension to

¹⁸ Rella Kaplowitz & Jasmine Laroche, *More Than Numbers: A Guide toward Diversity, Equity, and Inclusion (DEI) in Demographic Data Collection*, <https://schusterman.widen.net/s/rccfkzdxtn/deidatacollectionguide> [hereinafter Kaplowitz & Laroche].

¹⁹ See Kathryn Genthon & Diane Robinson, *Court Statistics Project, Collecting Race and Ethnicity Data* (Mar. 23, 2022) https://www.courtstatistics.org/_data/assets/pdf_file/0036/69678/Race_Ethnicity_Data_Collection.pdf [hereinafter Genthon & Robinson] (questioning whether courts should collect race and ethnicity data and providing questions to ask about potential data collection).

²⁰ National Center for State Courts: *The Racial Justice Organizational Assessment Tool for Courts* (https://www.ncsc.org/_data/assets/pdf_file/0018/88002/Racial-Justice-Organizational-Assessment-Tool.pdf).

²¹ See Kendra Cherry, *What Is Othering?*, *Very Well Mind* (Jan. 23, 2023) <https://www.verywellmind.com/what-is-othering-5084425>.

²² Genthon & Robinson at 1; see OAT Guidance at 15 (“Courts are charged with providing fair and equitable treatment across racial and ethnic groups. This task can best be accomplished through data driven decision-making. Race and ethnicity data are key to monitoring for inequities and making evidence-based policy decisions to address them when they are found. The ability to use these data to the court’s best advantage requires routine access to individual-level data.”).

participate in data collection, which is also likely exacerbated by the unanswered questions about access to and use of the information as described above. And, as will be addressed below, the Committee feels that the Commission must undertake this work with sensitivity and must put safeguards in place to prevent data breaches and other unauthorized access, as well as misuse of collected data. However, regardless of the rationale behind any individual's apprehension to provide their race, gender, and ethnicity, the Committee believes that a person's refusal to answer is, in and of itself, important and useful information to document.

III. METHODOLOGY

The information that follows is organized around the Data Committees' experience and learning while using the OAT.

A. OAT items relating to access to and the analysis of data

OAT Assessment Item II.2.1: Establish routine access to individual-level race/ethnicity data for analysis.

- Courts are charged with providing equal justice for all.
- Courts that are evidence-based and learning organizations will collect and analyze data to:
 - assess where they are meeting their responsibilities or falling short
 - identify areas for improvement
 - inform decisions about the most promising strategies forward
- To achieve this, courts need routine access to individual-level race/ethnicity data.

OAT Assessment Item II.2.6: Ensure data quality and completeness before use.

- A court data expert should follow standard protocols for reviewing data to ensure accuracy and completeness of race/ethnicity data fields.
- Data quality determines the accuracy of results. Analyses based on incomplete or poor-quality data can produce results that are not actionable, and increase the risk that resources are wasted on the wrong strategies for the community.

OAT Assessment Item II.2.7: Analyze race/ethnicity data as part of routine court improvement efforts.

- The goal of collecting race/ethnicity data is to use those data to monitor and improve performance.
- Data should be used to assess policies and practices, to identify which are effective at achieving court goals and which are not, and to inform decisions about court improvements.

The Vermont Judiciary does not currently collect individual-level race/ethnicity data, nor does it have routine access to such data from another agency.²³ The OAT expresses the

²³ Vermont OAT Assessment, p. 5.

importance of collecting race and ethnicity data and having routine access to individual-level data.²⁴ Such routine access “means that the court can access the data consistently on a repeated basis” without facing refused or delayed requests for other agencies’ data.²⁵

Because the Judiciary does not currently collect or access these data, it follows that the Judiciary does not currently ensure data quality/completeness or analyze the data.

B. OAT item relating to the “how” of collecting data

OAT Assessment Item II.2.4: Identify and understand the method used for collecting race and ethnicity data.

Odyssey, the Judiciary’s case management and court filing system, is the primary source for the maintenance of court-related case level data. It appears that Odyssey’s collection of race and ethnicity data currently serves as a kind of “jacket” structure; if data are collected in a criminal case, they will then appear in a civil case. This is something the Committee is examining and considering recommendations to modify.

Odyssey’s race and ethnicity fields are currently non-required, meaning an individual filling out the fields can simply navigate away from these data points without choosing an option from the drop-down menu. The Committee believes that editing the existing Odyssey fields, rather than engaging in an alternate collection method, is the preferred approach.²⁶

As noted in the OAT Guidance,

Race and ethnicity data may be obtained through two general means: self-identification or observation. Self-identified race and ethnicity data is based on the individual’s description of their own racial and ethnic identity as permitted by the racial and ethnic categories provided for selection. . . . Observed race data is based on another person’s classification of the individual’s race and ethnicity. For example, the race data associated with a traffic citation may be based on the person’s self-reported race on their driver’s license, or the ticketing officer’s observed impression of the individual’s race.²⁷

Although both self-identified and observed data are useful, there is a strong risk of discrepancies between the two methods for individuals of multi-racial identities or Hispanic/Latine²⁸

²⁴ Vermont OAT Recommendations p. 16.

²⁵ Ibid.

²⁶ See Genthon & Robinson at 4 (identifying an electronic filing system as an effective method of self-identification when the litigation involves the individual completing the fields).

²⁷ OAT Guidance for Courts (draft), at 20.

²⁸ This report uses “Latine” over “Latinx” or “Latino” out of respect for gender-neutral self-identification in a grammatical manner compatible with the Spanish language. See LATV Media, LATINE Vs. LATINX: What They Mean, Why They Matter (Aug. 10, 2021) <https://latv.com/latine-vs-latinx>.

ethnicities.²⁹ Therefore, the Odyssey fields must be edited to include a question about whether the information is provided through self-identification and observation.³⁰

Editing the Odyssey fields for this purpose will require waiting until the upgrade of the software, which is expected in late 2023. Alternatively, the Judiciary could submit a formal request to Tyler to enable these changes now, though neither the Committee nor the Judiciary's technology staff know how much that will cost or how much time it will take.

The Committee further strongly recommends that the Odyssey data collection fields include a grounding paragraph and resources for individuals who would like to learn more about why and how their information is being gathered and used.³¹ This paragraph would include instructions (such as the ability to check multiple boxes or to check "I decline to answer"), guarantees that the data would not be used to penalize a party or in the adjudication of any matter, and so on.

Additionally, the fields must no longer be optional; even if an individual chooses "I decline to answer," filling out the race, gender, and ethnicity portion must be mandatory. As discussed earlier, collecting responses indicating that individuals (for one reason or another) are uncomfortable or apprehensive about providing such sensitive data is useful information.

As the Committee intends to collaborate with additional members of Judiciary staff to discuss what changes to Odyssey are possible once the upgrade occurs. The Committee is also considering best practices for managing the data and ensuring that the human element of these data remains paramount; the continued safety and informed consent of Vermonters is the Committee's top priority.

C. OAT items relating to the "what" of collecting data

OAT Assessment Item II.2.2: Ensure that race/ethnicity data are collected in a manner that is compatible with a comprehensive set of standard high-level categories.

- NODS and CSP recommend compatibility with a standard set of general or high-level categories used by federal agencies. Consistency in categories allows for data-sharing and comparisons across jurisdictions and agencies.
- A more nuanced set of race/ethnicity categories can be combined into higher-level categories for this purpose.

²⁹ OAT Guidance for Courts (draft) at 19; Genthon & Robinson at 4 ("In most cases, observed race and self-identified race will be consistent. In cases where someone's race or ethnicity is ambiguous or not readily apparent to an observer, self-identified race will capture the individual's actual racial or ethnic heritage while observed race and ethnicity will capture the assumptions others make based on a person's appearance and other factors. While self-identified race and ethnicity are more accurate from an objective standpoint, observed race may better capture disparities in treatment based on visual cues.").

³⁰ OAT Guidance for Courts (draft) at 20 ("It is important to identify the court's race and ethnicity data as either self-identified or perceived, since each type has different benefits and limitations and can be used to answer different questions.").

³¹ See OAT Guidance for Courts (draft) at 1 (recommending "[c]ommunicat[ing] a leadership vision grounded in the court's mission that explicitly addresses the judiciary's commitment to racial equity, diversity, and inclusion.").

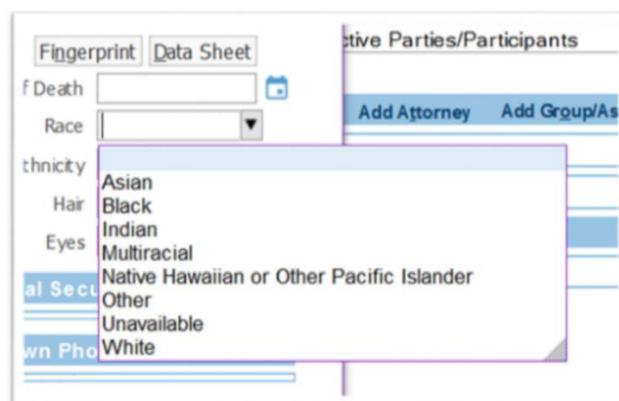
OAT Assessment Item II.2.3: Collect individual-level data in a manner that allows for all applicable race/ethnicity identities to be captured.

- This approach allows people of mixed racial and ethnic heritages to accurately self-identify.
- A single-select “multi-racial” or “two or more races” category is overly broad and does not reflect the unique needs of different mixed-race identities.
- This practice promotes inclusionary data collection practices and enables the ability to perform nuanced analyses.
- Although NODS uses a two-question approach to obtain race and ethnicity, a single field for race and ethnicity is acceptable (and in some ways preferable) as long as there is an option to select all that apply.

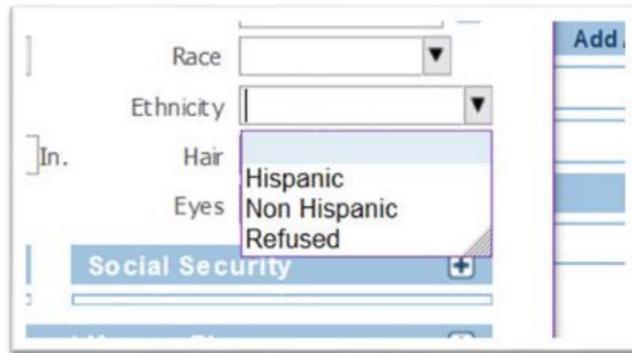
OAT Item II.2.5: Define race/ethnicity in data collection using categories that meaningfully describe the composition of your local community.

- To make informed decisions that are responsive to community needs, courts may benefit from collecting more detailed race and ethnicity data than the high-level categories recommended by NODS.
- More detailed categories may include tribal affiliation, national origin, ethnic group (beyond Hispanic/Latinx), or cultural group.
- More specific definitions will allow for nuanced analysis that may uncover opportunities for improvement that would otherwise have been lost by only using high-level race/ethnicity categories.
- Census data on your local community and input from local community leaders + other court community stakeholders can help the court refine the race/ethnicity categories used in data collection.
- Including groups with too few members will pose risks to group member privacy and the accuracy of any conclusion drawn from analysis of the group.

The current fields are as follows:

A screenshot of a web-based data collection form. The form includes fields for 'Fingerprint', 'Data Sheet', 'Date of Death', 'Race', and 'Ethnicity'. A dropdown menu is open for the 'Race' field, displaying the following options: Asian, Black, Indian, Multiracial, Native Hawaiian or Other Pacific Islander, Other, Unavailable, and White. The 'Ethnicity' field is also visible, with a dropdown menu that is partially obscured. The form also has buttons for 'Add Attorney' and 'Add Group/As'.

The above image shows the following options for race: Asian, Black, Indian, Multiracial, Native Hawaiian or Other Pacific Islander, Other, Unavailable, White.



The above image shows the following options for ethnicity: Hispanic, Non Hispanic, Refused.

The Commission’s charge and designation requires the collection of data related to race, gender, and ethnicity, but there is a healthy debate among data-collection experts about what specifically should be listed as options for each of these categories.³² One facet of the debate is whether it is sufficient to use “racial and ethnic categories consistent with the U.S. Census.”³³ “While Census data on your community can provide a starting point, courts should work with community leaders to determine which racial and ethnic categories should be captured in court data.”³⁴ Best practices seem to suggest that the Vermont Judiciary should consider “expanding the categories [it] collects to fit the needs of the community” such as “issues of access and fairness, need for interpreters, and equitable representation in court programs.”³⁵ Although consistency with the datapoints used in other parts of the state is in theory appealing, there is no real need for conformity for conformity’s sake. It is not onerous to provide a more comprehensive list to ensure that the Vermont Judiciary’s data collection accurately identifies the diverse populations of individuals who access Vermont courts.

The fields must also read “select all that apply” and be edited to allow individuals to select multiple options³⁶ to ensure that people of multi-racial heritage can accurately represent their identities. This is also important for individuals of Hispanic/Latine heritage. The current system assumes that such individuals likely identify as White or Black or Multiracial as their race and Hispanic/Latine as their ethnicity, but many people identify both racially and ethnically as Hispanic/Latine.³⁷ There is therefore a growing movement to combine race and ethnicity into one category to allow for people to self-identify in the way that is most true to them.³⁸ The

³² OAT Guidance for Courts (draft) at 20 (“Define race/ethnicity in data collection using categories that meaningfully describe the composition of your local community.”).

³³ Genthon & Robinson at 3; OAT Guidance for Courts (draft) at 20.

³⁴ OAT Guidance for Courts (draft) at 21.

³⁵ Genthon & Robinson at 3; OAT Guidance for Courts (draft) at 20-22.

³⁶ See OAT Guidance for Courts (draft) at 17 (asserting that the “option to select all that apply” is necessary; recognizing “the unique needs of different mixed-race identities”).

³⁷ Genthon & Robinson at 6.

³⁸ Genthon & Robinson at 6; OAT Guidance at 18 (“Although NODS uses a two-question approach to obtain race and ethnicity, a single field for race and ethnicity is acceptable (and in some ways preferable) as long as there is an option to select all that apply.”).

Committee is considering combining racial and ethnic data gathering in compliance with this growing consensus.

Concern was expressed within the Committee that a binary view of gender identity, especially without the context of sexuality, would further marginalize many Vermonters and obfuscate potential discrimination.³⁹ As an example of a more comprehensive approach to gender, gender-based crimes as defined by the International Criminal Court are crimes used “to regulate or punish those who are perceived to transgress gender criteria that define ‘accepted’ forms of gender expression manifest in, for example, roles, behaviors, activities, or attributes.”⁴⁰ This view of gender expression therefore includes conforming with or disregarding gender roles (such as employment, caregiving, clothing, romantic or sexual relationships with individuals of the same or a different gender, etc.) as well as biological characteristics. To discuss gender in terms of “man” or “woman” without providing space for sexuality and transgender, intersex, and nonbinary identities would provide an incomplete picture of (1) the marginalized identities of individuals who access the courts and (2) the potential discrimination that such individuals face.

Committee member recommendations for gender (with a prompt to “select all that apply”):

- Man
- Woman
- Nonbinary
- Genderqueer
- Intersex
- Cisgender
- Transgender
- Two-Spirit
- Other: ____
- I decline to state

Committee member recommendations for sexual orientation (with a prompt to “select all that apply”):

- Straight
- Lesbian
- Gay
- Bisexual
- Pansexual
- Asexual
- Queer
- Other: ____
- I decline to state

IV. PRACTICAL CONCERNS AND BROADER QUESTIONS

As noted above, clarity and specificity as to purpose and use regarding the Judiciary’s collection of data is key. The types of information the Commission will collect should reflect what the Commission is trying to achieve.

³⁹ See Laurel Westbrook & Aliya Saperstein, New Categories Are Not Enough: Rethinking the Measurement of Sex and Gender in Social Surveys, 29 *Gender & Society* 534 (2015).

⁴⁰ International Criminal Court, Policy on the Crime of Gender Persecution (Dec. 2022) <https://www.icc-cpi.int/sites/default/files/2022-12/2022-12-07-Policy-on-the-Crime-of-Gender-Persecution.pdf>.

The Committee identified several ways in which data collection practice can be improved. The Committee has considered the following questions, which were framed by the work of the NCSC, in coming to these observations:⁴¹

1. What questions does the court want to answer with this information?
 - a. Are these questions directly relevant to the Commission's goals as set forth in its charge and designation?
 - b. Is the information being collected only when necessary to achieve those goals?
2. Who needs access to this information?
3. How will information be provided to those who need access?
4. How can access be limited to those with a legitimate business need for it?
5. Who would be harmed if there were a data breach?
6. What measures are in place to protect the data in the event of a data breach?
7. Will the information, once originally collected, continue to carry over from docket to docket? From the civil into the criminal docket? From juvenile to adult? Is there an ability to change or remove the information later?
8. Will race, ethnicity, or gender information appear in an individual court file, or will it be anonymized and used for statistical reporting purposes only?
9. Is the information subject to disclosure if requested, such as through a Vermont Public Records Act request?
10. What about additional datapoints, such as disability or veteran status?

V. PRELIMINARY AND SUMMARY LIST OF RECOMMENDATIONS

The list below is based on the recommendations on data collection that come from the OAT. The Committee endorses this list.

1. Establish routine access to individual-level race/ethnicity data for analysis.⁴²
2. Ensure that race/ethnicity data are collected in a manner that is compatible with a comprehensive set of standard high-level categories.⁴³
3. Collect individual-level data in a manner that allows for all applicable race/ethnicity identities to be captured.⁴⁴
4. Identify and understand the method used for collecting race and ethnicity data.⁴⁵
5. Define race/ethnicity in data collection using categories that meaningfully describe the composition of your local community.⁴⁶

⁴¹ See Genthon & Robinson at 1.

⁴² OAT Guidance for Courts (draft) at 15.

⁴³ *Ibid.*, 16.

⁴⁴ *Ibid.*, 17.

⁴⁵ *Ibid.*, 19.

⁴⁶ *Ibid.*, 20.

6. Ensure data quality and completeness before use.⁴⁷
7. Analyze race/ethnicity data as part of routine court improvement efforts.⁴⁸

VI. CONCLUSION

The Committee has been actively engaged in the study of the issues with which it has been charged. This memo is being submitted to communicate the nature of the discussions had and to share detail regarding how the Committee has organized its efforts to date. This memo is a preliminary version of a more detailed workplan relating to the issues raised. Input from the Commission, the Supreme Court, and others with a stake in the Judiciary's collection and use of race, ethnicity, and other personal data will be essential during the Committee's next phase of work.

⁴⁷ Ibid., 22.

⁴⁸ Ibid., 23.