



Eastern Region Office
PO Box 60173
Philadelphia, PA 19102
215-592-1513 T
215-592-1343 F

Central Region Office
PO Box 11761
Harrisburg, PA 17108
717-238-2258 T
717-236-6895 F

Western Region Office
PO Box 23058
Pittsburgh, PA 15222
412-681-7736 T
412-681-8707 F

MEMORANDUM

TO: The Pennsylvania Senate

FROM: Elizabeth Randol, Legislative Director, ACLU of Pennsylvania

DATE: June 19, 2019

RE: OPPOSITION TO HB 276 P.N. 284 (Delozier)

Known as Marsy's Law, [HB 276 \(P.N. 284\)](#)¹ proposes an amendment to Article I of the Pennsylvania Constitution to establish a crime victims' 'bill of rights.' This resolution aims to grant crime victims comparable—and *enforceable*—rights to "justice and due process" equal to those provided to the accused and requires that their rights are "protected in a manner no less vigorous than the rights afforded to the accused" in criminal and juvenile proceedings.²

HB 276 borrows language from model legislation proposed by the [Marsy's Law for All campaign](#).³ California was the first state to amend its constitution to include Marsy's Law provisions in 2008. Since then, the [national campaign](#)⁴ has added to its roster several additional states that have passed similar constitutional amendments.

The criminal legal system absolutely owes victims the right to be treated with fairness and respect. Victims are owed the right to be notified of all court proceedings and to be heard at sentencing after the accused is convicted. But the focus on "balancing" victims' rights against the accused (and enhancing government's prosecutorial power) runs contrary to the reason why the Bill of Rights was enshrined in the Constitution – namely, to protect the accused from government overreach. The state provides constitutional rights to the accused in criminal proceedings as a check on state power, because the **state is attempting to deprive the accused of liberty, property, and in some cases, life**. But Marsy's Law, rather than serving as a restraint on state power, enforces rights against individuals – namely, the accused.

On behalf of over 100,000 members and supporters of the ACLU of Pennsylvania, I respectfully urge you to vote 'no' on House Bill 276 for the following reasons:

Unclear how a constitutional amendment remedies failure to enforce victims' rights

The [Pennsylvania Crime Victims Act](#)⁵ of 2007 not only enumerates many of the rights proposed in HB 276, but it includes scores of additional, robust protections for crime victims. But victims and their advocates have raised concerns about the lack of enforcement of these provisions. And yet, Marsy's Law offers no additional funding or resources to assist counties in providing more timely and thorough notification to victims, nor does it appear to offer a legal enforcement remedy. HB 276 grants victims "the right to assert in any trial or appellate

¹ PA House Bill 276, <https://www.legis.state.pa.us/cfdocs/billinfo/billinfo.cfm?year=2019&sind=0&body=H&type=B&bn=0276>

² PA House Bill 276 P.N. 284 § 9.1 (a) Rights of victims of crimes

³ Marsy's Law for All, <https://marsyslaw.us/about-marsys-law>

⁴ Felton, Emmanuel. "The Billionaire Funding Victims' Rights Campaigns Across the Country." *Pacific Standard*, 17 Jan. 2018, <https://psmag.com/social-justice/billionaire-funding-victims-rights-campaigns-across-the-country>

⁵ 18 P.S. § 11.101 et seq, http://www.ova.pa.gov/AboutOVA/CrimeVictimsRights/Documents/crime_victims_act%5b1%5d.pdf

court, or before any other authority, and have those rights enforced,” but then stipulates that the bill “does not grant the victim party status or create any cause of action for compensation or damages.”⁶ It is unclear how victims would have standing to assert their rights in court if they are not party to the case. This caveat creates an even more baffling precedent, namely the creation of a constitutional right that limits (if not prohibits) people from suing in order to enforce the protections granted to them in the amendment. The ACLU-PA certainly has no objection to additional measures to ensure victims receive timely notice regarding offender updates and opportunities to be heard throughout the process. But amending the PA Constitution is the least effective, slowest, and most inappropriate, expensive, and unchartered way to reach that end.

A constitutional amendment severely inhibits ability to correct unforeseen consequences

If the legislature wants to enforce, change, or expand victims’ rights, amending the statutory language in the Crime Victims Act is a far more prudent option. A constitutional amendment, if enacted, is not flexible. Should unintended or unforeseen problems arise with implementation, application, or interpretation, amending the constitution (again) is an unduly burdensome, if not unrealistic, mechanism to make the necessary adjustments. In fact, South Dakota recently became the [first state to amend Marsy's Law after adopting it just two years earlier](#),⁷ citing skyrocketing costs to counties, additional personnel needed for prosecutors to provide notification to victims of non-violent offenses, and costs due to delayed bond hearings and plea deals.

Victims’ rights granted under HB 276 likely conflict with due process rights afforded to defendants

The full effect of this proposed amendment is difficult to gauge because several of its provisions are dangerously broad or vaguely worded. This lack of clarity compounds a more fundamental concern, namely that the rights granted to victims may conflict with the accused’s right to due process under the PA and U.S. Constitutions.

- **Right to prevent disclosure to defense**: HB 276 provides victims the right to “refuse an interview, deposition or other discovery request made by the accused or any person acting on behalf of the accused.” This broad language risks, if not invites, refusals that deny the defense [access to legitimate discovery](#).⁸ How does the definition of “request” relate to a subpoena or a court order? Additionally, this provision provides no guidance for how judges should resolve conflicts between a victim’s right to refuse and the accused’s right to disclosure. What should a judge do when a victim’s right to refuse discovery and depositions runs up against a defendant’s constitutional right to evidence that could prove their innocence? Whose rights should a judge favor if such discovery requests were necessary to provide the accused with a fair trial? In the absence of legal clarity, we risk inconsistencies and injustice.
- **Right to be heard at criminal proceedings**: HB 276 provides victims enforceable rights to notice of essentially all proceedings in a criminal case and the right to be heard at those proceedings, in some cases ***before the accused has even been convicted***. Of specific concern is the right to be present at all public proceedings involving the criminal or delinquent conduct. What if a victim isn’t present - can a case proceed? Would it be subject to relitigation? How would a lack of notice or a victim’s absence conflict with prescribed dates for hearings required by law? Would the right of a victim to be present at a proceeding override a sequestration request by the defense?

If critical proceedings (such as bail hearings) are delayed for the purpose of providing notice to the victim, the rights of the accused may be infringed. Similarly, if the victim’s right to be “heard” translates to the right to prevent or delay release, setting of bail, or resolution of the case through a plea bargain, then the provisions would substantially infringe on the due process rights of the accused.

⁶ PA House Bill 276 P.N. 284 § 9.1 (b)

⁷ Ferguson, Dana. “What’s at stake as voters again consider victims’ rights amendment.” *Argus Leader*, 21 May, 2018, <https://www.argusleader.com/story/news/politics/2018/05/18/marsys-law-south-dakotans-consider-victims-rights-revisions/607289002>

⁸ 234 Pa. Code Rule 573. Pretrial Discovery and Inspection, <https://www.pacode.com/secure/data/234/chapter5/s573.html> Pennsylvania courts are bound by the PA Rule of Criminal Procedure 573 and the decision in *Brady v. Maryland*, 373 U.S. 83 (1963), which held that prosecutors must disclose materially exculpatory evidence in the government’s possession to the defense; failure to disclose such evidence violates the due process rights of the accused, commonly referred to as a ‘Brady violation.’

- **Right to a speedy trial and prompt conclusion:** HB 276 grants victims the right to “proceedings free from unreasonable delay and a prompt conclusion of the case.” We are again confronted by two competing sets of enforceable rights: the victim’s right vs. a defendant’s right to a speedy trial as guaranteed by Article I, Section 9 of the Pennsylvania Constitution and the Sixth Amendment to the U.S. Constitution. How is this conflict resolved? Does a victim’s right to be free from unreasonable delay take precedence over the accused’s need for more time to develop their defense? And while Pennsylvania’s [Rule 600](#)⁹ defines when a defendant must be brought to trial, HB 276 offers neither a definition of “unreasonable delay” nor any criteria for judges to use in determining what constitutes “unreasonable” – a worrisome invitation to arbitrary decision-making.

HB 276 will increase costs to the state and will amount to an unfunded mandate for counties

The [fiscal impact](#)¹⁰ of SB 1011, the Marsy’s Law bill passed last session, was estimated at \$1 million - \$1.5 million in FY 2018-2019, based solely on the costs associated with the advertising required to notify the public about a proposed constitutional amendment.¹¹ Not included in this estimate were any costs to the state resulting from the rights provided to crime victims in the proposed amendment, namely the cost of increased notification requirements and delays in criminal proceedings. By way of comparison, Marsy’s Law was estimated to [cost North Dakota roughly \\$2 million per year](#)¹² due in part to expanded notification requirements and delays in court hearings and proceedings.

Of the 11 states that have passed Marsy’s Law, ten of those states allow victims to “opt in” to at least one of the services enumerated in their amendment ([CA](#), [IL](#), [ND](#), [FL](#), [NV](#), [SD](#), [OK](#), [NC](#), [KY](#), [OH](#)). While Pennsylvania’s Crime Victims Act does allow victims to choose which notifications to receive, Pennsylvania’s version of Marsy’s Law does not qualify *any* of the protected services with “upon request.” This means that all victims, of all crimes, will be constitutionally required to receive all notifications and invitations to be heard or participate at all stages of the process described in HB 276. And because constitutional amendments supercede statute, the obligation to provide these services to an enormously expanded universe of victims (regardless of whether or not a victim wants to be notified) will create a significant burden on the agencies required to notify victims, including district attorney’s offices, Office of Victims’ Services, Department of Public Welfare, state and county corrections, county probation, juvenile probation, and parole. And, of course, what also remains unclear is the additional expense to counties for additional burdens on criminal defense services. Because Pennsylvania remains the only state that does not provide state-level funding for indigent defense, [counties are strapped with 100% of the costs](#)¹³ associated with defending its poorest residents. As a result, HB 276 will likely function as an unfunded mandate to be borne exclusively by Pennsylvania counties.

Our criminal justice system is, of course, imperfect – people are wrongfully accused of crimes and sometimes wrongfully convicted. But on balance, we trust that an adversarial system that protects and enforces the constitutional rights of the accused against the power of the state is the best way to ensure justice is served. Yet, in making victims’ rights equal to that of the accused, Marsy’s Law threatens to upset that adversarial balance by limiting the rights of a defendant precisely at the moment when the government is attempting to use its law enforcement power to deprive the accused of liberty, property, and in some instances, life.

For these reasons, we ask you to vote ‘no’ on House Bill 276.

⁹ 234 Pa. Code Rule 600. Prompt Trial, <https://www.pacode.com/secure/data/234/chapter6/s600.html>

¹⁰ SB 1011 P.N. 1402 Fiscal Note, Senate Appropriations Committee, January 2, 2018, <http://www.legis.state.pa.us/WU01/LI/BI/SFN/2017/0/SB1011P1402.pdf>

¹¹ Pennsylvania requires that legislation proposing to amend the Constitution be passed by the General Assembly in two consecutive legislative sessions. The fiscal note only accounts for public advertising costs during one of the two required legislative sessions.

¹² Nowatzki, Mike. “Marsy’s Law cost estimated at \$2M per year.” *Dickinson Press*, 16 Sept. 2016, <http://www.thedickinsonpress.com/news/4126084-marsys-law-cost-estimated-2m-year>

¹³ The Sixth Amendment Center: Know Your State – Pennsylvania, <http://sixthamendment.org/know-your-state/pennsylvania/>