Town of Hanson
POLICE DEPARTMENT
775 Main Street
Hanson, MA 02341
(781) 293-4625 Fax: (781) 293-4624
http://www.hansonpolice.org

Michael R. Miksch
Chief of Police

Lt. Michael D. Casey
Executive Officer

July 17, 2020

Via e-mail to: Testimony.HWMJudiciary@mahouse.gov

Re: Concerns to Senate 2820 as Amended

Dear Char Cronin and Chair Michlewitz

I have been watching the debate regarding the recent amended Senate Bill 2820 "*An Act to Reform Police Standards and Shift Resources to Build a more Equitable, Fair and Just Commonwealth that Values Black Lives and Communities of Color*" submitted to the House on 7/15. I have a number of concerns regarding this Act.

I am the Chief of Police for the Town of Hanson. I am one of 22 full time officers and 8 part time officers who make up the men and women of the Department. We police a Town of approximately 11,000 people in Plymouth County. I have over 25 years in law enforcement in Massachusetts. I have worked in two different communities over those years. I also am a certified instructor for the Municipal Police Training Committee (MPTC). I am writing after consulting with the Massachusetts Chiefs of Police Association and the Southeastern Massachusetts Chiefs of Police Association.

First, I would like to say I am disappointed in the Senate for the rush to pass this bill with no public input. I want to thank the House for giving us the opportunity for public input on this important legislation. I have broken out a list of concerns that corresponds with the section numbers of Senate Bill 2820:

SECTION 4 (line 230): Under (iv), the provision states that there shall be training in the area of the "*history of slavery, lynching, racist institutions and racism in the United States.*" As an instructor for the MPTC, I would welcome the training. What I do not understand, is why is this limited to training for Law Enforcement? Why would we not have all State and Municipal Employees be required to take such training? I think a well researched and factual curriculum would benefit all employees. Not to compare two major issues in society, but rather as an example, sexual harassment in the workplace is addressed annually and upon being hired by most government agencies. Why would we not do training on the history of racism and racist institution just as many of us do with preventing sexual harassment in the work place? Again, I am not comparing the two societal ills but simply pointing out that we recognize one problem across all employees but we will only expose one group of government employees to a different problem in society?

SECTION 6 (line 272): In terms of the establishment of a POST (Peace Officer Standards and Training) Program, I wholeheartedly support the general concept. That said, the acronym of POSAC (Police Officer Standards Accreditation and Accreditation Committee) is causing significant confusion both in this bill and in the Governor's Bill. POST has nothing to do with *Accreditation* but has everything to do with *Certification* – and by implication "De- certification".

In this state, there currently exists a *Massachusetts Police Accreditation Commission* (MPAC) for over 20 years which is made up of members of Law Enforcement (Chiefs, Ranking Officers), Municipal Government, and Colleges/Universities (Chiefs) in which currently 93 police agencies are accredited based on the attainment of national standards modeled from the *Commission on Accreditation for Law Enforcement Agencies*(CALEA). Utilizing the word "Accreditation" in the title is definitely misleading and should be eliminated. To the best of our knowledge 46 other states use the acronym POST which seems to work without any problems or a need to create a new description of the important program.

On a note with Accreditation, I believe assistance from the State to allow local departments to reach accreditation would add to the professionalism and standardization of law enforcement in the Commonwealth. Currently the MPAC is supported financially by the organizations taking part. For example, Hanson is starting toward certification which is the first step in reaching accreditation. It cost my department $1500 a year to support MPAC. Grant funding and incentives to cities and towns would be a great addition to this bill.

SECTION 6 (line 282): The Senate Bill states that POSAC shall be comprised of "14 members", however as outlined there are actually 15 positions. I strongly urge the House version allow for two (2) seats on the POSAC to be appointed by the Mass Chiefs of Police Association (MCOPA) Executive Committee.

SECTION 6 (line 321) :It appears from the language of the POSAC provision that the committee shall have the power to conduct what is referred to as "*independent investigations and adjudications of complaints of officer misconduct*" without any qualifying language as to how that would be implemented in terms of what type of alleged misconduct (law violations, use of force, injury, rude complaints, etc.) and when and under what circumstances will adjudications be subject to review resulting in a proposed oversight system that could go down the slippery slope of becoming arbitrary and capricious at some point and subject to a high level of scrutiny and criticism.

Also, how are these complaints vetted? Having done a number of internal affairs investigations over the years, I have found a many to either be a misunderstanding or outright lies about an officer. Remember the very nature of our job has us dealing with people who are often less than honest at times. For officers to buy in to this system they need to know they will be treated fairly.

SECTION 10(c) (line 570): Section 10 of "*An Act to Reform Police Standards and Shift Resources to Build a more Equitable, Fair and Just Commonwealth that Values Black Lives and Communities of Color*" (the Act) is problematic, not only for law enforcement in the Commonwealth, but all public employees. In particular, Section 10 calls for a re-

write of the existing provisions in Chapter 12, section 11I, pertaining to violations of constitutional rights, commonly referred to as the Massachusetts Civil Rights Act (MCRA). The MCRA is similar to the provisions of 42 U.S.C. § 1983 (setting for a federal cause of action for a deprivation of statutory or constitutional rights by one acting under color of law), except however, that the provisions of the MCRA as it exists today, does not require that the action be taken under color of state law, as section 1983 does. See G.L. c. 12, § 11H. Most notably, Section 10 of the Act would change that, and permit a person to file suit against an individual, acting under color of law, who *inter alia* deprives them of the exercise or enjoyment of rights secured by the constitution or laws of the United States or the Commonwealth of Massachusetts. By doing so, the Senate is attempting to draw the parallel between the federal section 1983 claim and the state based MCRA claims.

The qualified immunity principles developed under section 1983 apply equally to claims under the MCRA. See Duarte v. Healy, 405 Mass. 43, 46-48, 537 N.E.2d 1230 (1989). "The doctrine of qualified immunity shields public officials who are performing discretionary functions, not ministerial in nature, from civil liability in § 1983 [and MCRA] actions if at the time of the performance of the discretionary act, the constitutional or statutory right allegedly infringed was not 'clearly established.'" Laubinger v. Department of Rev., 41 Mass. App. Ct. 598, 603, 672 N.E.2d 554 (1996), citing Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982); see Breault v. Chairman of the Bd. of Fire Commrs. of Springfield, 401 Mass. 26, 31-32, 513 N.E.2d 1277 (1987), *cert. denied sub nom.* Forastiere v.Breault, 485 U.S. 906, 108 S.Ct. 1078, 99 L.Ed.2d 237 (1988); Duarte v. Healy, supra at 47-48, 537 N.E.2d 1230.

In enacting the Massachusetts Civil Rights Act, the Legislature intended to adopt the standard of immunity for public officials developed under section 1983, that is, public officials who exercised discretionary functions are entitled to qualified immunity from liability for damages. Howcroft v. City of Peabody, 747 N.E.2d 729, Mass. App. 2001. Public officials are not liable under the Massachusetts Civil Rights Act for their discretionary acts unless they have violated a right under federal or state constitutional or statutory law that was "clearly established" at the time. Rodriguez v. Furtado, 410 Mass. 878, 575 N.E.2d 1124(1991); Duarte v. Healy, 405 Mass. 43, 537 N.E.2d 1230 (1989).

Section 1983 does not only implicate law enforcement personnel. The jurisprudence in this realm has also involved departments of social services, school boards and committees, fire personnel, and various other public employees. That being said, if the intent of the Senate is to bring the MCRA more in line with section 1983, anyone implicated by section 1983, will likewise be continued to be implicated by the provisions of the MCRA. Notably, the provisions of the MCRA are far broader, which should be even more cause for concern for those so implicated.

Section 10 of the Act further sets for a new standard for the so-called defense of "qualified immunity." Section 10(c) states that "In an action under this section, qualified immunity shall not apply to claims for monetary damages except upon a finding that, at the time the conduct complained of occurred; no reasonable defendant could have had reason to believe that such conduct would violate the law"

This definition represents a departure from the federal standard for qualified immunity, although the exact extent to which is departs from the federal standard is up for debate, at least until the SJC provides clarification on it. The federal doctrine of qualified immunity shields public officials of all types from liability under section 1983 so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Harlow v. Fitzgerald, 457 U.S. 800 (1982). Stated differently, in order to conclude that the right which the official allegedly violated is "clearly established," the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. Anderson v. Creighton, 483 U.S. 635 (1987). It protects all but the plainly incompetent and those who knowingly violate the law. Malley v. Briggs, 475 U.S. 335 (1986). As a result, the standard sought to be created under Section 10 of the Act would provide public employees with substantially less protection than that afforded under the federal standard. Qualified immunity balances two important interests – the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." Pearson v. Callahan, 555 U.S. 223 (2009).

Furthermore, although the Senate's version of "qualified immunity" would only apply to state-based claims under the MCRA, what Section 10 proposes is fairly similar to that proposed by the 9th Circuit Court of Appeals in various decisions. In those instances where the 9th Circuit sought to lower the standard applicable to qualified immunity, the U.S.Supreme Court has squarely reversed the 9th Circuit, going so far as scolding it for its attempts to do so. See Kisela v. Hughes, 138 S.Ct. 1148 (2018); City of Escondido v. Emmons, 139 S.Ct. 500 (2019).

Although legal scholars and practitioners have a grasp as to the meaning of qualified immunity as it exists today, uncertainty will abound if this standard is re-written, upending nearly fifty years of jurisprudence. Uncertainty in the law can only guarantee an influx in litigation as plaintiffs seek to test the new waters as the new standard is expounded upon by the courts.

"Qualified immunity balances two important interests – the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." Pearson v. Callahan, 555 U.S. 223 (2009).

This is my and my officer's biggest concern regarding this bill. I fear officers will hesitate to take action with this new standard. This also seems to go beyond just law enforcement officers and leaves other public sector employees open to civil liability. Also, many people think that qualified immunity gives law enforcement a pass on any civil action. This is far from the truth. We do not have absolute immunity; rather Judges act as a gate keeper, keeping the frivolous complaints out of the already busy court system.

SECTION 39 (line 1025): The provision to inform both the appointing authority and the local legislative body of the acquisition of any equipment and/or property that serves to enhance public safety makes perfect sense. That said, to have a public hearing

available for all in the general public to know exactly what equipment the police departments may or may not possess serves to put communities in jeopardy in that those with nefarious motives will be informed as to what equipment that the department has at its disposal. This is very dangerous.

Also, to require each regional law enforcement group to have public hearings in each community they cover is not practical. Hanson belongs to SEMLEC which covers over 20 cities in Towns in Plymouth and Bristol Counties. It would be impossible to have hearings in all the cities in towns.

SECTION 49 (line 1101-1115): This provision prevents school department personnel and school resource officers (who actually work for police departments), from sharing information with law enforcement officers – including their own agency – when there are ongoing specific unlawful incidents involving violence or otherwise. This quite frankly defies commonsense. School shootings have been on the rise since 2017. The learning environment in our schools must continue to be safe and secure as possible and information sharing is critical to ensuring that this takes place. We have had a School Resource Officer (SRO) for over 20 years serving the Whitman Hanson Regional School District. The sharing of information has been critical. We also have an agreement where the SRO, will share with key school personal when a student or their family has had contact with law enforcement. We do not share what that contact was, just that the child maybe stressed based on the interaction.

For example, law enforcement responds to a domestic violence call at a household with school age children. The SRO would contact the principal of the school the child attends and tell them to *handle the child with care today*. This allows the school guidance counselors and administration to take a different approach to the child. For example, maybe the child is sleeping in class because the child did not get adequate rest or is having discipline issues as they do not know how to deal with the stress they are feeling. Instead of disciplining the child they go to the nurse for a nap or the guidance office to discuss their stress. By doing this we may avoid the child suffering from unwarranted discipline by the school while giving the child a safe learning environment. This information sharing in both direcetions is critical to the success of all.

SECTION 50 (line 1116): There seems to be a slight nuance to the amended language to Section 37P of Chapter 71 replacing "*in consultation with*" to "*at the request of.*" The Hanson Police have had school resource officer program for over 20 years. The only reason why officers are assigned to the schools is because they have been "requested" to be there by the school superintendents - period. These officers serve as mentors for these students. The 2018 Criminal Justice Reform Act has very specific language that outlines the qualifications of an SRO, the joint performance evaluations that are to be conducted each year, the training that they shall have and the language specific MOU's that must exist. I am not sure why this provision needs to be included.

SECTION 52 (lines 1138-1251: There are several recommended changes to data collection and analysis as it pertains to stopped motor vehicles and pedestrians in this section. The Hands Free/Data Collection Law was signed into law only a few months ago before the onset of the pandemic. The new law contains a comprehensive

system of data collection, benchmarking, review, analyses and potential consequences. This language appears to be what did not make its way into the Hands-Free Law which as you know was heavily debated for several months based strictly on the data collection component.

I also believe handing every person we interact with a "receipt" is extreme. This will make officers again, less apt to interact with the public. I think there will be unintended consequences in the other direction as well. Why would I not just give you a fine if I am going to stop you? Instead of the polite quick interaction to warn you that your state required inspection sticker expired two days ago, I am going to give you a fine? Often I have seen many people who are just scrapping by financially, trying to do the right thing, suffer even more financial setbacks by having to deal with fines that could have gone toward repairing their car instead. Just leave the data alone and use what is already in the Hands Free Law that was debated publically.

SECTION 55 (line 1272): To be clear, we do not teach, train, authorize, advocate or condone in any way that choke holds or any type of neck restraint that impedes an individual's ability to breathe be used during the course of an arrest or physical restraint situation. That said, I respect the discussion and concern pertaining to what is now a national issue based on the tragedy in Minneapolis. Under part (d) the language states that "[a] law enforcement officer shall not use a choke hold. [...]." What should also be included is a reasonable and rational provision that states, "*unless the officer reasonably believes that his/her life is in immediate jeopardy of imminent death or serious bodily injury.*"

There needs to be a deadly force exception to eliminate any possible confusion that this could cause for an officer who is in the midst of struggling for their life and needs to avail themselves of any and all means that may exist to survive and to control the subject. This is a reasonable and fairly straightforward recommendation.

Recommended New Section] Amends GL Chapter 32 Section 91(g):

In order to expand the hiring pool of trained, educated, qualified and experienced candidates with statewide institutional knowledge for the Executive Directors' positions for both the *Municipal Police Training Committee* as well as the newly created *POSAC* (or POST), the statute governing the payment of pensioners for performing certain services after retirement, shall be amended to allow members of Group 4 within the state retirement system to perform in these two (2) capacities, not to exceed a three (3) year appointment unless specifically authorized by the Governor.

It makes sense that an experienced law enforcement professional from the Commonwealth hold these positions. We have had a number of out of State directors come in but there is always a learning curve to adapt to Massachusetts. Besides experienced law enforcement person from within the Commonwealth will have already forged relationships with and have the respect of those they serve.

In closing I want to again thank you for taking public input. This Act has far reaching impacts on both the citizens we serve and the officer who enforce the laws of the Commonwealth.

Sincerely and Respectfully Submitted,

Michael R. Miksch

Chief of Police