THE COMMONWEALTH OF MASSACHUSETTS
House of Representatives
24 Beacon Street
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Claire Cronin, Chair of the Judiciary
Room 136
24 Beacon Street
Boston, MA 02116-3803
July 14, 2020

Re: Policing Legislation

Dear Chair Cronin:

Thank you for taking on the enormous task of crafting legislation to respond to the national calls for action following the death of George Floyd, Breonna Taylor, and so many before them at the hands of our police. Our constituents have demanded that we act, not with half-measures, but with bold policy initiatives that will start to put an end to 400 years of wrongs in this country. I am proud to be part of the legislative body that is taking on this enormous task, and thank you for the tremendous work you are doing to bend the arc of justice.

It is critical that we follow the lead of our siblings of color as we proceed to do this work, and so I write to you today to ask that all four components of the Massachusetts Black and Latino Caucus' agenda be included in this omnibus bill, which includes 1) creating a special commission on peace officer standards and training, 2) developing an Office of Diversity and Equal opportunity, 3) establishing a commission on structural racism, and 4) setting clear statutory limits on police use of force, including fully banning chokeholds and other tactics that can have deadly consequences. Many of these points were already included in the Senate legislation, which I hope will be a starting point for the House so that we can have a fully conferenced bill to submit to the Governor before July 31.

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I would be remiss, however, after watching nearly seventeen hours of debate in the Senate if I did not underscore the importance of some of the pieces of the legislation that were most debated.

QUALIFIED IMMUNITY

While there is an extraordinary amount of misinformation on qualified immunity, this is a key component of any reform work and one that, I feel, we must address in this bill: the elimination of qualified immunity. Qualified immunity is not required by any constitution or statute. It is a purely judicial doctrine which was unavailable to police or other public officials under constitutional law until 1967 when it was established by the Warren Court in Pierson v. Ray. In 1974, the Court expanded the scope of qualified immunity in Scheur v. Rhodes, a case brought by the families of students killed at Kent State, when it ruled that qualified immunity would apply to all suits under Section 1983 (established by the Civil Rights Act of 1871, i.e. the Ku Klux Klan Act) not just to constitutional claims similar to common law claims that allowed for a good faith defense. This ruling allowed National Guard members who killed students during a protest to not be held liable for their actions.

However, in 1982, the Court deemed that any inquiry into an officer's good faith was irrelevant in Harlow v. Fitzgerald, using clearly established law as the metric for objective reasonableness of an official's conduct. This made qualified immunity available in all cases, to all defendants, unless the violation of rights was "clearly established." In 1985, the Court explained what this standard means in practice: qualified immunity provides "ample protection to all but the plainly incompetent or those who knowingly violate the law." These are problematic rulings that did little to protect civil rights, particularly when coupled with broad leniency for excessive use of force.

In Massachusetts, the SJC's narrow interpretation of the Massachusetts Civil Rights Act to limit civil rights violations to threats, intimidation, or coercion has led to behavior such as public strip searches from not being considered a civil rights violation by the Courts. Qualified immunity has, in effect, moved far from its intended purpose, which was to encourage police diligence and to protect police from reasonable mistakes. It has now eroded the protection of civil rights to only "clearly established" rights, requiring the dismissal of a case unless "every reasonable official would have understood that what he is doing" violates a clearly established right. To clarify, this means that suits are dismissed that arise from misconduct most non-police consider unacceptable based on a Qualified Immunity legal technicality that the immunized conduct failed to exactly replicate the facts of a prior appellate decision finding that such conduct violated the clearly established right. As we have seen in the mass protests across this country, people now feel that police are "above the law" and our Courts have supported that belief with narrow rulings. It is the Legislature's duty to address this.

While I appreciate that some have expressed concern that changing anything about qualified immunity would lead to economic hardship, none of the proposed legislation changes MGL Ch. 258, § 9 or Ch. 258, § 13. State and municipal employees are indemnified by employers "except an intentional violation of the civil rights of any person" (MGL, Ch. 258, § 13.). Despite claims to the contrary, no one's home is at risk due to damage awards due to homestead laws and the fact that the employer is found liable, not the employee. Additionally, our cities and towns,

through collective bargaining, provide liability insurance for our officers, generally up to $1 million, including the State Police. In fact, public servants who violate civil rights laws bear very little risk of financial consequences for bad behavior, underscoring the need for the four points mentioned above in addition to the elimination of qualified immunity.

The risk of inaction on the topic of qualified immunity is substantial. Qualified immunity is a clear way in which our judicial system perpetuates systemic racism by letting government actors off the hook for violating civil rights. The doctrine's practical purpose is to make it impossible for victims to have their day in court. Dismantling systemic racism requires reforming qualified immunity, and I hope that this will be an important component of any legislation the House takes up.

SCHOOL RESOURCE OFFICERS

As schools across the state try to grapple with how they move toward antiracist policies, one of the issues they grapple with is policing in schools. While we often see the image of an officer with a friendly looking dog in attempts to ease the public's mind about these programs, this is highly traumatic for children whose families are justice-involved or who have interacted with the Department of Children and Families. We know children need mental health and socio-emotional support as they return to school in the era of COVID-19. Instead, our state's ratio of students to counselors (304:1) fails to meet the nationally recommended ratio of 250:1.

Having an officer at a school means having arrests at schools. I have heard first-hand from constituents how race plays an enormous role in these interactions and how students are often arrested for school violations. The priority should be to remove police from schools entirely. The definition of a "school resource officer" (SRO) in M.G.L. c. 71 § 37P(a) can be amended to include: A school resource officer shall not be located on school grounds but at the local police station and shall be charged with serving as the primary responder to calls from public schools.

In the absence of this, school committees should be allowed to decide, by annual public vote, whether to assign police to schools. This solution is imperfect but in a state with strong local rule, we should allow communities, like my own, that do not want to have a SRO to opt-out. Additionally, superintendents should be required to annually share data on the costs of school policing, the budget for mental and emotional health support, and school-based arrests and referrals with the public, school committee, and the department of education. Further, there should be no information-sharing by school staff and school police to the Boston Regional Intelligence Center and other gang databases. Provisions of this nature were included in S2800 by two clarifying amendments to support the principles of the underlying bill, and I hope that they will be included in the House bill as well to give our districts local control and provide much needed transparency.

BANNING TEAR GAS AND OTHER CHEMICAL AGENTS

While the Senate bill redrafted an amendment to ban teargas and the use of other chemical agents, I feel strongly that the House should instead fully ban them. It is unconscionable that although banned for warfare across the world, in the United States, arguments are made to use these agents against our own people. Especially at a moment of a global pandemic where their

use can exacerbate the transmission of disease, it is time to ban their use and to demand that our police rise to the occasion of using less dangerous methods of de-escalation. This ban should absolutely extend to our prisons and houses of correction, where the use of chemical agents is far too common.

PRISON USE OF FORCE

It is impossible to draft a bill that talks about racism and policing without going on to address the many issues with the DOC. I was part of the group of legislators who went to Souza-Baranowski Correctional Center in January when the prison was put on lockdown and swat teams roamed the halls. I interviewed incarcerated persons who had been abused, pepper sprayed, bit by dogs, and had rubber bullets shot at them. It became very clear that excessive use of force was not an anomaly at SBCC but often a planned reality.

Therefore, I would ask that the House bill include language that establishes clear limitations on the use of physical force by correctional officers. The commission established by S2800 should also collect and analyze data on the use of force against inmates, and the department of correction and sheriffs should provide the commission access to any and all reports written pursuant to 103 CMR 505:13 (1) and (2) or successor provisions. That commission should ascertain whether the information provided is uniform, standardized, and reasonably complete and, if not, should recommend policies to increase uniformity, standardization, and completeness. Additionally, incarcerated persons and their families should be able to have access to these videos upon request. I would support language that requires an inmate and the inmate's legally designated representative to have the right to obtain a copy of all records relating to any use of force incident involving the inmate including, but not limited to, written reports, investigations, video and audio recordings and photographs and to require that records relating to any use of force incident involving an inmate be a public record, establishing to what extent.

JUVENILE REINVESTMENT FUND

I was delighted to see the Justice Reinvestment Act Workforce Development Fund included in S2800 and in S2820. The Justice Reinvestment Act Workforce Development Fund would reinvest savings from criminal justice system reforms into evidence-based programs for job creation, training, and placement to create economic opportunity in communities where policing and incarceration are highest. The fund would be managed by a 13-person board of directors, who would vet and distribute grants to eligible workforce development programs. At least 6 of the 13 members of the board would represent the target beneficiaries, ensuring that our key stakeholders – people with these lived experiences – are at the decision-making table.

It would support communities most impacted by policing and mass incarceration in Massachusetts. Target beneficiaries include youth, emerging adults, veterans, victims of violence, people living in poverty, and people with significant barriers to employment; for example, adults without high school diplomas, individuals convicted of felonies, and people with disabilities. The fund formula takes the difference between the combined population of the DOC and HOCs in FY19 (2020) multiplied by the rate of total population growth for the Commonwealth since FY19, and the actual combined population of the DOC and HOCs in that

year. The secretary of EOHED would multiply said difference by the average marginal cost rate per inmate, which EOPSS would calculate annually based on the actual rates used by the DOC and HOCs for their budgets. The comptroller would transfer an amount equal to one half of the product of this calculation to the fund, but not more than $10 million and subject to appropriation annually

However, S2820 includes a $10 million cap on this fund that would not do enough for our communities. Without this limit on the reinvestment formula, the Justice Reinvestment Workforce Development Fund could invest upwards of $38.4 million in communities this year. In comparison, the proposed FY21 DOC budget is $674 million. To add a layer of nuance, in 2012, there were 11,723 prisoners in Massachusetts Department of Corrections and in 2019 it was 8,784, a 25% decline while incredibly the budget for the DOC went up 20% from $579,378,000 to $679,493,942 for FY 2019. This just speaks to the need to lift this cap.

TRANSITIONING AWAY FROM POLICE RESPONSE

Cities and towns across the country are starting to find ways to move away from a police response for calls that would instead benefit from a trained social worker. However, embedding social workers in the police departments has not shown to work and has led to social workers taking on a corrections mentality. Social workers are also not allowed to control situations and are subject to the direction of police if they are allowed to respond to calls. As such, I believe it is time the state moved to the Community Emergency Response Team.

Every city and town must have equitable access to a response team that is composed of on-call social workers that have the appropriate expertise in mental/behavioral health, and substance misuse. Communities may work together to provide these services based on their population and geography. Emergency dispatch services should immediately direct calls falling within the Mandatory List of Emergency Calls to the Community Emergency Response Teams. These calls shall include but are not limited to: family trouble, truancy, domestic disputes, elder abuse, child abuse, substance misuse and overdose, psychiatric/mental health problem, suicidal thoughts, noise complaints, wellness checks, loitering, squatting or trespassing, shoplifting, larceny under $250, disorderly conduct, disturbing the peace, receiving stolen property, minor driving offenses not including moving violations, breaking and entering into vacant or abandoned property, destruction of property, public intoxication, drunk and disorderly conduct, minor in possession of alcohol, drug possession, and drug possession with intent to distribute. The Community Emergency Response Teams are able to liaise with other relevant agencies including Domestic Violence Units, DCF, Elder Abuse, and other agencies at their discretion. These teams should operate under the Department of Public Health. Importantly, the Community Emergency Response Team should operate independently from and not fall under the authority of any police agency.

The Community Emergency Response Team should be composed of qualified social workers as defined as an individual with a Masters in Social Work or Social Welfare degree from a CSWE (Council of Social Work Education) accredited institution with expertise in mental health, behavioral health, substance misuse, crisis intervention, de-escalation techniques, antiracist practices, and implicit bias. The Community Emergency Response Team may also include other licensed clinicians and paraprofessionals.

A Commission should be formed to ensure the Community Emergency Response Teams have appropriate training. This Commission should be composed of the National Association of Social Workers MA Chapter, Cape Verdean Social Work Association, the Greater Boston Association of Black Social Workers, Latinx Social Workers Association, the Massachusetts Peer Support Network, Visioning BEAR Circle Intertribal Coalition, Families for Justice as Healing, Boston Users Union, Western Massachusetts Learning Community, NAMI, Jane Doe, MOAR, or their designee to establish best practices and a training protocol. The Commission should be chaired by the Commissioner of the Department of Public Health or her designee.

The National and Statewide Social Worker organizations should collaborate to conduct training or contract training to other agencies, as appropriate. The training must include training on mental health, behavioral health, substance misuse, crisis intervention, de-escalation techniques, antiracist practices, and implicit bias.

The state 911 commission and state 911 department should adhere to the Mandatory List of Emergency Calls and, in consultation with the Commission, establish policy and protocol for the appropriate direction of 911 calls to the Community Emergency Response Team. Emergency dispatchers should be trained to determine the appropriate response to incoming calls and determine when referrals should be made to the Community Emergency Response Team. Once a call is received, the Community Emergency Response Team should determine whether other emergency services, including police, are necessary for any call that falls within the Mandatory List of Emergency Calls. The Commission should establish best practices and a training protocol for dispatchers, and the National and Statewide Social Worker organizations should collaborate to conduct training or contract training to other agencies as appropriate. To facilitate this, each PSAP should be capable of transmitting a request for community emergency response, law enforcement, fire fighting, medical, ambulance or other emergency services to a Community Emergency Response Team or public or private safety department that provides the requested services.

The Community Emergency Response Teams should be paid for by block funding from total existing local police department budgets as well as an additional fee for all calls to which the team responds. The police departments will also be billed for all necessary follow-up calls as well as MassHealth, Medicaid or private insurance as applicable and appropriate. To ensure their service is cohesive across the state, all response teams should have access to a centralized database of records of all calls answered that could be in compliance with HIPAA. As such, this database should not be accessed by any law enforcement agency for any reason. Finally, the Community Emergency Response Teams should submit quarterly reports to cities and towns and DPH highlighting the number of calls and the category of calls. This will verify the efficacy of the program and allow funding to be properly distributed if the balance of calls tips towards the Community Emergency Response Teams and not the police.

As I understand this is a larger idea, one possible solution would be to include a pilot program for the Community Emergency Response Teams in the legislation, which would allow the state to work out all of the details of the program before moving to a full state-wide model.

UPDATING THE 911 COMMISSION

The 911 commission is currently made up predominantly of law enforcement personnel. This makes it difficult for training to include a recognition of calls that need a crisis response and not a police response. Updating and shifting the balance of the 911 Commission to include members from the National Association of Social Workers MA Chapter, Cape Verdean Social Work Association, the Greater Boston Association of Black Social Workers, Latinx Social Workers Association, the Massachusetts Peer Support Network, Visioning BEAR Circle Intertribal Coalition, Families for Justice as Healing, Boston Users Union, Western Massachusetts Learning Community, NAMI, Jane Doe, and MOAR would be an important step to creating long-lasting institutional change.

DECARCERATION

The COVID-19 pandemic poses a grave and immediate threat to incarcerated people, who are housed in close quarters with no ability to engage in social distancing. Incarcerated people are particularly vulnerable to the impacts of COVID-19, as many are elderly and have medical conditions that put them at serious risk. The environment in prisons and jails is not conducive to promoting health and welfare during this pandemic and immediate measures must be taken to decarcerate in order to save lives and reduce the spread of COVID-19. An Act regarding decarceration and COVID-19, which I filed back in March, appropriately balances public safety needs against the imminent public health threat of COVID-19 and takes immediate and necessary steps to release people from incarceration so that they can care for themselves and their communities.

As there are new outbreaks and a threat of resurgence, moving at least some components of this bill are critical. Particularly, parole reform is critical and we cannot speak of policing reform without acknowledging the years and years of policy that lead to mass incarceration. If any piece were to move forward with this bill, I would ask that we do something for those who are eligible for either parole or medical parole and suffer from dementia. Because of their illness, they are unable to request a proxy to file on their behalf and the DOC does not submit petitions. The DOC does not share information on the number of incarcerated individuals with dementia, rightly, because of HIPPA but at the same time these people are caught in a dystopian nightmare of being too ill to help themselves and being stuck in prison because of that inability to act. I would ask that for incarcerated individuals with documented cases of dementia, the DOC be required to inform counsel and, if the person does not have counsel, request an attorney be appointed through CPCS or Prisoners' Legal Services so that a guardian may be appointed on grounds that the incarcerated person is unable to make decisions on his/her own. This would avoid any individual who is parole eligible from spending additional years in prison or a house of correction simply because of a debilitating illness that prevents them from taking action on their own.

FACIAL RECOGNITION

Finally, I would ask that this legislation include an unequivocal ban on the use of dangerous facial recognition technology. The dangers of face surveillance and systemic racism in policing are clear and I represent a district that has already banned its use. I hope that the final legislation will do so as well.

Thank you very much for your thoughtful consideration of all of these points. This legislation is incredibly important and I am grateful for the opportunity for this hearing and the ability to submit testimony. I am, as always, available for any and all questions, and I look forward to working together to pass a strong bill that will protect the most vulnerable residents of the Commonwealth.

Kindly,

Lindsay N. Sabadosa
State Representative, 1st Hampshire

c/c Aaron Michlewitz, Chair of House Ways and Means
Robert DeLeo, Speaker of the House

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